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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

GENERAL MOTORS ACCEPTANCE CORPORATION,
Petitioner,

VS.

GEORGE H. MITCHELL and CAROL J. MITCHELL,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. When a debtor proposes to retain and use collateral that secures a claim, by what standard should a bankruptcy court value the collateral under 11 U.S.C. § 506(a) to determine the amount of the secured claim—retail value, as the Fourth Circuit held in *In re Balbus*, 933 F.2d 246 (4th Cir. 1991); or wholesale value, as the Ninth Circuit held in this case?

LIST OF PARTIES

All parties to the proceedings below are listed in the caption of this petition.

GMAC is a wholly owned subsidiary of General Motors Corporation ("GM"). GM is a publicly owned corporation and is not a subsidiary or affiliate of any other publicly owned corporation. All United States and Canadian subsidiaries of GM are wholly owned except Motor Enterprises, Inc., which is partly owned by the United States Small Business Administration. GMFanuc Robotics Corp. is a joint venture between GM and Fanuc, Ltd. New United Motor Manufacturing, Inc. is a joint venture between GM and Toyota Motor Corp.

GMAC and its subsidiaries issue commercial paper and finance vehicle purchases. Motors Insurance Corporation, a wholly owned subsidiary of GMAC, and its subsidiaries offer various forms of insurance coverage to the public.

No other publicly owned corporation that is a subsidiary or affiliate of GM has a financial interest in the outcome of this litigation.

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PETITION FOR A WRIT OF CERTIORARI

General Motors Acceptance Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on January 21, 1992.

OPINIONS BELOW

The January 21, 1992 opinion of the Court of Appeals for the Ninth Circuit is published at 954 F.2d 557 and is reprinted as Appendix A, p. A-1.

The unpublished amended memorandum decision of the United States Bankruptcy Appellate Panel for the Ninth Circuit was filed on June 15, 1990 and is reprinted as Appendix B, p. A-9.

The order of United States Bankruptcy Court for the Northern District of California on debtor's objections to claims of General Motors Acceptance Corporation, filed February 2, 1989, is reprinted as Appendix C, p. A-17. The oral statement of decision of the bankruptcy court, announced on January 6, 1989, is reprinted as Appendix D, p. A-19.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on January 21, 1992. GMAC filed a timely petition for rehearing and suggestion of appropriateness of rehearing en banc on February 4, 1992. The Mitchells filed a timely petition for rehearing on February 5, 1992. On April 1, 1992, the Court of Appeals denied both petitions for rehearing and rejected the suggestion for a rehearing en banc.

The petition for certiorari is filed within 90 days after April 1, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 11

Section 506. *Determination of secured status*

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property. . . . Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

Section 1325. *Confirmation of plan*

(a) Except as provided in subsection (b), the court shall confirm a plan if—

. . .

(5) with respect to each allowed secured claim provided for by the plan—

. . .

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim . . . .

STATEMENT OF THE CASE

This case involves a fact pattern replicated many thousands of times each year.

Respondents, the Mitchells, bought a car—in this case, a $28,000 Cadillac. They made a down payment and signed a conditional sale contract which granted the seller a lien in the car to secure the Mitchells' promise to pay the rest of the purchase price over time. The seller assigned the Mitchells' conditional sale contract to petitioner GMAC.

Barely a year later, the Mitchells filed a petition under Chapter 13 of the Bankruptcy Code.

The Mitchells proposed, and the bankruptcy court confirmed, a Chapter 13 plan under which the Mitchells would pay their secured creditors, over time, the full value of their allowed secured claims. Allowed unsecured claims were to be paid at ten percent of their full value.

GMAC filed a proof of claim, asserting the Mitchells owed it $27,062.25 and averring this debt was secured by the car. The Mitchells objected to GMAC's claim, contending that the fair market value of the car was only $19,725, and that the portion of GMAC's claim in excess of that amount was unsecured.

At the evidentiary hearing on the Mitchells' objection, two expert appraisers testified. The Mitchells' expert said the car was worth $20,761, based on low (or wholesale) Kelley Blue Book value. GMAC's expert testified the car was worth $24,185, based on high (or retail) Kelley Blue Book value. On the choice between these competing values rode more than a ten percent ($3,082) loss for GMAC and discount for the Mitchells in the price of their Cadillac.

The bankruptcy court adopted GMAC's expert's value, reasoning that "[t]he vehicle is not being liquidated and sold by the secured creditor, but, rather, being kept by the debtor for its continued use throughout the term of the plan," and that doing so "enhances the debtor's ability to perform the terms of the plan [and] forces the creditor into an extension of the loan in which the creditor is protected only by the court's valuation of the particular vehicle." App. E, p. A-25—A-26.

The Mitchells appealed. The Bankruptcy Appellate Panel for the Ninth Circuit reversed, reasoning that under the first sentence of 11 U.S.C. § 506(a), "a secured creditor's allowed secured claim should be equal to the lesser of the creditor's interest in the property or the estate's interest in the property." App. B, p. A-12. Therefore, "the value of the car should be its wholesale value or what GMAC will receive from selling the car in a commercially reasonable manner." App. B, p. A-15. In other words, "a court should fix an amount based on evidence showing the price obtainable at such a sale, less sales cost, such as advertising and commission." App. B, p. A-15, n. 6.

GMAC appealed to the Court of Appeals for the Ninth Circuit.[1] In a split decision, the Court of Appeals affirmed.

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[1] The bankruptcy court had jurisdiction to determine the Mitchells' objection to GMAC's claim pursuant to 28 U.S.C. §§ 157(a), 157(b)(2)(B), and 1334. The bankruptcy court's written order on the Mitchells' objection to GMAC's claim was filed on February 2, 1989. The order was appealable. *In re Morse Elec. Co.*, 805 F.2d 262, 264-65 (7th Cir. 1986); *In re Fox*, 762 F.2d 54, 56 (7th Cir. 1985); *In re Saco Local Development Corp.*, 711 F.2d 441, 446-48 (1st Cir. 1983). The Mitchells timely appealed on February 10, 1989.

The Bankruptcy Appellate Panel had jurisdiction of the appeal pursuant to 28 U.S.C. §§ 158(b)(1), 1334, N.D.Cal. General Order No. 24 and the Ninth Circuit Amended Order Establishing And Continuing The BAP.

The Bankruptcy Appellate Panel entered its original memorandum decision on April 25, 1990. The Mitchells filed a timely motion for rehearing on March 4, 1990. On June 15, 1990, the Bankruptcy Appellate Panel denied that motion and filed an amended memorandum decision. (Footnote continued)

Relying heavily on a law review article by Bankruptcy Judge Queenan and what it saw as the majority of reported bankruptcy court decisions, the Court of Appeals majority held that § 506(a) requires valuation of the "creditor's interest," not the debtor's interest, in the collateral. 954 F.2d at 560; App. A, p. A-4. Hence, the majority held, "the wholesale value should apply as a general rule in valuing vehicles." 954 F.2d at 560; App. A, p. A-5. The proposed use of the collateral should not affect valuation, according to the Court of Appeals' majority, except in unusual cases where the debtor's use is particularly beneficial to the debtor or particularly detrimental to the collateral's value. *Ibid.*

In dissent, Judge Noonan wrote:

> The key fact is that the debtor is going to use the car. The wholesale price testified to by the Mitchells' expert is irrelevant. The debtor is not going to wholesale the Cadillac. There is no better way of arriving at its value "in the light of . . . its proposed use" than to determine the cost of providing a similar car. That figure is the high Blue Book figure. The statutory provision controls.

954 F.2d at 561; App. A, p. A-7.

REASONS FOR GRANTING THE WRIT

Valuation of collateral is crucial in bankruptcy. The collateral's value determines the amount of a claim that is secured and entitled to additional rights and protection under the Bankruptcy Code. 11 U.S.C. § 506(a).

Collateral must be valued for many different purposes in bankruptcy, including confirmation and implementation of reorganization plans, motions for relief from stay, applications for use of cash collateral, and redemption. *See* Carlson, *Secured Creditors and the Eely Character of Bankruptcy Valuations*, 41 AM. U. L. REV. 63, 66-70 (1991).

(Footnote 1 continued)

GMAC timely filed its notice of appeal on July 10, 1990. F.R.App.P. 4(a)(i) and 6(b)(2)(i). The Court of Appeals had jurisdiction of GMAC's appeal under 28 U.S.C. § 158(d).

Valuation of collateral is an issue in most of the 225,000 new Chapter 13 cases each year. If collateral must be valued at its wholesale value, as the Ninth Circuit held in this case, creditors will lose several hundred million dollars each year in those cases alone.

Certainty in the legal standard for valuing collateral is necessary to reduce the volume of contested valuation proceedings and to decrease the amount the financially strapped debtor and its creditors spend resolving the issue.

Uncertainty is what currently prevails. More than 70 published lower court decisions address the question of the proper legal standard for valuing collateral. *See* App. E, pp. A-31—A-36. They reach conflicting results, well illustrated by the conflict between the Ninth Circuit's opinion in this case and the Fourth Circuit's decision in *In re Balbus*, 933 F.2d 246 (4th Cir. 1991).

The Ninth Circuit opinion in this case, and the line of lower court cases it follows, misinterpret § 506(a), reading its two sentences as conflicting with each other, and construing the "creditor's interest . . . in such property" in a manner inconsistent with this Court's reading of the same words in *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371-72, 108 S.Ct. 626, 630, 98 L.Ed.2d 740 (1988).

This Court should grant certiorari in this case to resolve the conflict among the lower courts on the important issue of the legal standard for valuation of collateral that the debtor proposes to retain as well as to reaffirm the interpretation of § 506(a) adopted in *Timbers*.

1. Valuation of collateral is crucial in bankruptcy. Each year, thousands of proceedings and hundreds of millions of dollars turn on the legal standard of valuation of collateral. A uniform interpretation of 11 U.S.C. § 506(a) is urgently needed by courts, creditors and debtors alike.

Valuation of collateral is crucial in bankruptcy. Under 11 U.S.C. § 506(a), a claim is secured only to the extent of the value of the collateral. Because many provisions of the Bankruptcy Code grant added protections and privileges to holders of secured

claims,[2] collateral must be valued for a wide variety of purposes under different Bankruptcy Code sections in liquidation cases under Chapter 7 as well as in reorganization proceedings under Chapters 11, 12, or 13.[3]

The collateral's value determines whether the creditor may obtain relief from the automatic stay,[4] whether the creditor will be adequately protected if the debtor or trustee uses, sells or leases the collateral, including cash collateral, or whether the debtor or trustee may grant a superior or equal lien in the collateral to secure postpetition credit.[5] Collateral must also be valued to set the amount a debtor must pay to redeem the property under 11 U.S.C. § 722 and to see if a creditor is oversecured and entitled to postpetition interest and fees.[6]

The collateral's value is most critical in the context from which this case arose—a cram-down plan.[7] Such a plan, under Chapter

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[2] *See* Carlson, *Undersecured Claims Under Bankruptcy Code Sections 506(a) and 1111(b). Second Looks At Judicial Valuations of Collateral*, 6 BANKR. DEV. J. 253, 258-59 (1989).

[3] *See* 1 Norton Bankruptcy Law & Practice, § 22.03, part 22, p. 3 (1990); 3 King, Collier on Bankruptcy, ¶ 506.04, p. 506-16 (15th ed. 1992).

[4] 11 U.S.C. §§ 362(d)(1), (2)(A), 1205(b); *see In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984) (debtor equity is the classic form of adequate protection justifying continuation of the automatic stay); *see also In re Fischer*, 136 B.R. 819, 824-25 (D. Alaska 1992).

[5] 11 U.S.C. §§ 363(e), (f)(3), 364(d)(1)(B); *see In re Aqua Associates*, 123 B.R. 192, 197-98 (Bankr. E.D. Pa. 1991).

[6] 11 U.S.C. § 506(b); *see United Savings Ass'n v. Timbers of Inwood Forest Associates, supra*, 484 U.S. at 372, 108 S.Ct. at 631.

[7] A cram-down plan is a plan that is not accepted by holders of an impaired class of claims and that does not provide for return of collateral to the non-accepting claimants. *See* H.R. Rep. 595, 95th Cong., 1st Sess. 413 (1977) *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6369.

11, 12 or 13, must provide a holder of a secured claim an amount not less than the value of the collateral securing the claim.[8]

Collateral must be valued in a large number of other bankruptcy settings as well.[9]

Because valuation of collateral plays an important role in so many aspects of bankruptcy proceedings, under so many different sections of the Code, the standard of valuation makes a crucial difference in thousands of bankruptcy disputes each year, involving hundreds of millions of dollars.

More than 225,000 new Chapter 13 petitions were filed in the year ending September 30, 1991. Bankruptcy Statistical Information, prepared by the Administrative Office of the United States Courts, as revised Dec. 1991. If the debtor retained a car purchased on credit in only half of those cases, and the average difference between wholesale and retail value of those cars was only $2,000, the choice between wholesale and retail value would make a $225 million difference to debtors and creditors for that

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[8] 11 U.S.C. §§ 1129(b)(2)(A), 1225(a)(5)(B), 1325(a)(5)(B); *see, e.g., In re Peerman*, 109 B.R. 718 (Bankr. W.D. Tex. 1989).

[9] *E.g.*, 11 U.S.C. § 101(32) (insolvency test requires valuation of collateral); 11 U.S.C. § 109(e); *see In re Balbus, supra*, 933 F.2d at 247 (value of collateral determines eligibility for relief under Chapter 13); *In re Caraway*, 95 B.R. 466, 467 (Bankr. W.D. Ky. 1988) (value of collateral sets amount of creditor's unsecured claim after return of collateral); 11 U.S.C. § 547(c) (trustee may avoid as preference a transfer creating a security interest in inventory, receivables or proceeds if the transfers reduced the amount by which the debt exceeded the value of all security interests for the debt 90 days before the petition was filed); 11 U.S.C. § 548(a)(2)(A) (trustee may avoid as a fraudulent transfer a transaction in which the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation"); 11 U.S.C. § 1122 (value of collateral determines creditor's voting rights on Chapter 11 plan). *See* Queenan, *Standards for Valuation of Security Interests in Chapter 11*, 92 COM. L. J. 18, 25-28 (1987) (listing 14 types of bankruptcy proceedings requiring valuation of collateral); Carlson, *supra*, 41 AM. U. L. REV. at 66-70 (listing 11 types of proceedings requiring valuation of collateral).

year alone. GMAC alone has more than 35,000 customer accounts currently involved in Chapter 13 proceedings.

Cars are not the only collateral which must be valued.[10] Nor is collateral valued only in connection with Chapter 13 plans.

A uniform, national approach to valuing collateral in bankruptcy is urgently needed. Uncertainty as to the standard for valuing collateral spawns litigation, as shown by more than 70 published lower court decisions regarding the legal standard of valuation. *See* App. E, pp. A-31—A-36.

Repetitive litigation over the legal issue of the standard of valuation wastes the resources of the overworked bankruptcy courts and the scarce funds of debtors and creditors.

The absence of a uniform standard and the divergent views of courts in different districts and circuits on this fundamental issue will only encourage more litigation on the same issue, harming both debtors and creditors. Creditors will remain unable to evaluate their future risk of loss from bankruptcies if different jurisdictions apply different valuation standards. Varying valuation standards also encourage business debtors to forum shop among the many possible venues for filing their bankruptcy petitions. *See* 28 U.S.C. § 1408.

The Court should grant this petition and adopt a uniform approach for all bankruptcy courts in valuing collateral.

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[10] If the debtor retained a home in just a quarter of the Chapter 13 cases begun in 1990-91, that the average house price was $80,000, and that selling costs averaged ten percent, *see In re Parr*, 30 B.R. 276, 278 (Bankr. N.D. Ala. 1983), the choice of a standard of valuation made an additional $450 million difference in 1990-91.

2. The Ninth Circuit's decision in this case conflicts with *In re Balbus*, 933 F.2d 246 (4th Cir. 1991). Other lower courts are equally split in choosing a standard of valuation, under § 506(a), of collateral retained by the debtor.

Section 506(a)'s terse text[11] and scant legislative history[12] have given rise to conflicting interpretations by the lower courts, a conflict epitomized by the clash between the Ninth Circuit's

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[11] Section 506(a) provides:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property. . . . Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

[12] The House Report states:

> "Value" does not necessarily contemplate forced sale or liquidation value of the collateral; nor does it always imply a full going concern value. Courts will have to determine value on a case-by-case basis, taking into account the facts of each case and the competing interests in the case.

H.R. Rep. 595, 95th Cong., 1st Sess. 356 (1977) *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6312.

The Senate Report contains only the second of the two sentences quoted from the House Report. S. Rep. No. 989, 95th Cong. 2d Sess. 68 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5854. The deletion of the first sentence from the Senate Report does not appear intended to signal any substantive change. The Senate version of § 506(a), which was eventually adopted, *see* 124 Cong. Rec. H11095 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); 124 Cong. Rec. S17411 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini), changed the House version in only two respects—adding wording dealing with setoffs, and adding the section's second sentence. The addition of the section's second sentence, if anything, emphasizes and codifies the intention stated in the first sentence quoted from the House Report on the bill.

reasoning in this case and the Fourth Circuit's rationale in *In re Balbus, supra*, 933 F.2d 246.[13]

a. One line of authority interprets § 506(a)'s first sentence as requiring collateral to be valued at wholesale.

The Ninth Circuit decision in this case, and the line of cases it follows, hold that § 506(a)'s first sentence requires the court to value the creditor's interest in the collateral, not the collateral itself or the debtor's interest in the collateral.[14] The creditor's interest is limited, according to these courts, to the ability to foreclose and sell the collateral. Section 506(a)'s first sentence, the Ninth Circuit held, directs courts to "determine what the creditor would obtain if the creditor were to make a reasonable disposition of the collateral." 954 F.2d at 960; App. A, p. A-4.

No matter how the debtor proposes to use or dispose of the collateral, the value of the creditor's interest, therefore, is what the creditor could recover, net of selling costs, upon foreclosure and sale of the collateral. Under the Ninth Circuit's reasoning, the debtor's proposed use of the collateral would affect its valuation only in those rare instances where that use is "particularly beneficial" or "particularly detrimental," as by causing unusually rapid depreciation. 954 F.2d at 560; App. A, p. A-5.

A majority of the lower court decisions involving valuation of cars as collateral have followed this line of reasoning, concluding that cars retained by the debtor must be valued at wholesale. *See* App. E., pp. A-32—A-34.

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[13] "Bankruptcy courts confronted with how to interpret 'valuation' in § 506(a) when a debtor proposes to keep the secured collateral have reached conflicting results." *In re Balbus, supra*, 933 F.2d at 248; *see also* 3 King, Collier on Bankruptcy, ¶ 506.04[2], p. 506-36 (15th ed. 1990).

[14] Quoting Queenan, *supra*, 92 COM. L. J. at 30, the Ninth Circuit majority states that " 'what is being valued is the creditor's "interest" in the collateral, not the debtor's interest.' " 954 F.2d at 960; App. A, p. A-4.

b. An opposing line of authority reads § 506(a)'s second sentence as requiring valuation at retail when the debtor proposes to retain the collateral.

An opposing line of authority rejects the Ninth Circuit's reasoning, pointing out:

> If the [first sentence of § 506(a)] were interpreted to mean that the value must be fixed at the amount which the creditor would receive on foreclosure, then the last sentence of the statute which provides that the value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of the property, would be surplusage. Such an interpretation would mean that the value should always be fixed at the amount which the creditor would receive upon foreclosure regardless of the purpose of the valuation and of the proposed disposition or use of the property. The test would not depend upon whether the debtor intended to release the property or intended, instead, to retain and use the property. It is not appropriate for the court to ignore or give no effect to the language of the last sentence of the statute.

In re Courtright, 57 B.R. 495, 497 (Bankr. D. Or. 1986).

The Fourth Circuit found this reasoning compelling, quoting *Courtright* with approval and adding:

> The second sentence of 11 U.S.C.§ 506(a) requires that we determine the value of a creditor's interest "in light of the purpose of the valuation and of the proposed disposition or use of such property." We find that we cannot ignore the direction of that sentence and thus cannot follow those courts which have chosen to focus on the first sentence of § 506(a).

In re Balbus, supra, 933 F.2d at 250, 252.

Most decisions involving valuation of real property collateral have followed this reasoning and have held that real property collateral should be valued at fair market value without deducting

the costs a creditor would incur in selling the property.[15] *See* App. E., pp. A-31—A-32.

Nothing in § 506(a)'s wording suggests that different standards of valuation should be applied to real property collateral as opposed to cars. Yet at least one court has required wholesale valuation of cars, while holding that real property should be valued at market value without deducting sales cost. *Compare In re Malody,* 102 B.R. 745, 749 (9th Cir. BAP 1989) *with In re Case,* 115 B.R. 666, 669-70 (9th Cir. BAP 1990).

c. Other decisions have adopted different interpretations, exacerbating the confusion.

Other courts have adopted values that are neither wholesale nor retail, but lie somewhere in between. *See* App. E, pp. A-34—A-36.

Adding to the confusion, decisions addressing the valuation of collateral have used a diverse vocabulary that further obscures the results reached.[16]

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[15] In cases involving cars, the standard of valuation determination is normally addressed as a decision between wholesale and retail values, while in cases involving valuation of real property collateral, the debate is over deducting or refusing to deduct hypothetical costs of selling the property. Despite the difference in terminology, the same question is involved, as the Bankruptcy Appellate Panel decision in this case makes clear. *See* App. B, p. A-15 & n. 6.

[16] Among the many terms the courts have used to describe the different possible values of collateral are liquidation value, forced sale value, fair market value, price obtained from commercially reasonable sale with or without deduction of selling costs, retail value, going concern value, and so forth. *See* 3 King, Collier on Bankruptcy, ¶ 506.04[2], p. 506-36 (15th ed. 1990).

This petition uses the term "wholesale value" to mean the price obtained on sale of the collateral to a retail dealer or the price obtained on a commercially reasonable sale of the property, less commissions and other costs of sale. The petition uses "retail value" to mean the price charged by retailers for similar property (i.e., used property of a similar type, condition and age) or the price obtained on a commercially reasonable sale of the property, *without* deducting commissions and other costs of sale.

The lower courts are in disarray as to how to interpret § 506(a). They need this Court's guidance, as do debtors and creditors. This is a particularly good case in which to provide that guidance since it arises in one of the two most litigated contexts, involves few facts, and offers clearly defined wholesale and retail values.

3. The Court Of Appeals misconstrued § 506(a). Its interpretation conflicts with this Court's decisions and gives the section's second sentence no effect.

The Ninth Circuit's opinion in this case, and the line of authority it follows, misinterpret § 506(a).

First, the Ninth Circuit's reading of § 506(a) conflicts with this Court's decision in *United Savings Ass'n v. Timbers of Inwood Forest Associates, supra,* 484 U.S. at 371-72, 108 S.Ct. at 630-31. Construing § 362(d)'s words "the value of such entity's interest in such property," this Court noted in *Timbers*: "The term 'interest in property' certainly summons up such concepts as 'fee ownership,' 'life estate,' 'co-ownership,' and 'security interest' more readily than it does the notion of 'right to immediate possession.' " *Ibid.*

Any ambiguity in § 362(d)'s wording was clarified, this Court held, by § 506(a)'s use of the similar phrase "the value of such creditor's interest . . . in such property." In § 506(a), "the creditor's 'interest in property,' obviously means his security interest without taking account of his right to immediate possession of the collateral on default." 484 U.S. at 372, 108 S.Ct. at 631. In this Court's words: "The phrase 'value of such creditor's interest' in § 506(a) means the 'value of the collateral.' " *Ibid.*

Under this Court's reasoning in *Timbers,* § 506(a)'s first sentence requires valuation of the collateral itself, not valuation of the creditor's right to possession and sale of the collateral.

The Ninth Circuit read § 506(a)'s first sentence to mean just the reverse. It held that § 506(a)'s first sentence commands bankruptcy courts to value the creditor's "interest" in the collateral, not the collateral itself. And it held that the creditor's "interest" is limited to the amount the creditor would obtain if the creditor were to foreclose and sell the collateral. 954 F.2d at 560;

App. A, p. A-4. The Ninth Circuit's reading of § 506(a) cannot be squared with this Court's reasoning in *Timbers*.

Second, the Ninth Circuit's reading of § 506(a)'s first sentence is incompatible with the "holistic" approach to statutory construction which this Court applied in *Timbers*. 484 U.S. at 371, 108 S.Ct. at 630.

The Ninth Circuit's interpretation of § 506(a)'s first sentence makes that sentence conflict with the following sentence of the same section. If the creditor's interest is to be valued, not the collateral itself, then the debtor's proposed disposition or use of the collateral makes no difference. Yet, the second sentence of § 506(a) commands the court to consider the proposed disposition or use in valuing the collateral.

In re Claeys, 81 B.R. 985, 990-91 (Bankr. D. N.D. 1987), another decision following the Ninth Circuit's reasoning, makes this conflict clear:

> Whether a valuation is made without regard for potential costs of liquidation depends, it seems, upon the emphasis given to the first and second sentences of section 506(a). The first sentence, providing that the claim is secured to the extent of the value of the creditor's interest in the property, suggests that since it is the creditor's interest that is being valued and not the collateral itself, it should not make any difference whether the debtor is retaining the property. Yet, the language of the second sentence suggests that the proposed disposition or use of the collateral itself must be considered when determining that value.

Statutes should be interpreted to harmonize their provisions.[17] To read the first sentence of § 506(a) as conflicting with the second sentence of the same section is to say Congress was irrational or drafted the statute ineptly. Such an interpretation should be avoided.

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[17] *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631, 93 S.Ct. 2469, 2484, 37 L.Ed.2d 207 (1973); *Boise Cascade v. United States Environmental Protection Agency*, 942 F.2d 1427, 1432 (9th Cir. 1991).

Third, the Ninth Circuit's reading of § 506(a)'s first sentence offends the rule requiring that each part of a statute be given effect.[18] Recognizing this problem, the Ninth Circuit did, begrudgingly, give some small play to § 506(a)'s second sentence. The debtor's use of the property might, in the Ninth Circuit's view, affect valuation of a creditor's interest in a business reorganization when the collateral is used as part of a going concern with good prospects for reorganization or where the debtor's use is particularly beneficial or particularly detrimental, causing rapid depreciation. 954 F.2d at 560; App. A, p. A-5.

This reading of § 506(a)'s second sentence is incompatible with its wording, which makes no distinction between businesses and other debtors, and which directs the courts to determine value in light of the proposed disposition or use of the collateral in all cases, not just in unusual circumstances. Under the Ninth Circuit's reading, the debtor's use of the collateral would affect valuation so infrequently that the Senate surely would not have gone to the effort of amending the House Bill to add § 506(a)'s second sentence.

Moreover, the Ninth Circuit's exception for unusual circumstances is inconsistent with its own reasoning. If it is the creditor's interest that must be valued, it should make no difference that the debtor uses the collateral in a business[19] or derives particular benefits from its use. A debtor's detrimental use of collateral might justify more rapid repayment or other measures for adequate protection of the creditor's interest, but it could not affect the net amount the creditor would receive on foreclosure.

Fourth, the Ninth Circuit's interpretation is inconsistent with the structure of the sections of the Bankruptcy Code dealing with reorganization plans in Chapter 11, 12 and 13 cases. In each

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[18] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979).

[19] If the Ninth Circuit meant its business exception seriously, it should have applied it in this case since, as the Ninth Circuit itself acknowledged, Mitchell used the car in his business. *See* 954 F.2d at 559, 561; App. A, pp. A-2, A-7.

chapter, Congress required that the plan provide unsecured creditors at least what they would receive if the debtor's estate were liquidated under Chapter 7.[20] Each of the reorganization chapters gives secured creditors added protection. The plan must provide a secured creditor at least the value of its collateral.[21]

This separate treatment of secured creditors would mean little if collateral were always or nearly always valued at what a creditor would realize upon foreclosure and commercially reasonable sale of the collateral because that is what a secured creditor receives in a liquidation under Chapter 7—the collateral, which it can resell, or the proceeds of the trustee's sale of the collateral. If Congress had intended to guarantee secured creditors only this value in reorganization proceedings, it could easily have rephrased the provisions dealing with unsecured creditors to assure all creditors of treatment at least equal to what they would receive on liquidation under Chapter 7.

Fifth, the Ninth Circuit's reading of § 506(a) conflicts with this Court's recent decision in *Dewsnup v. Timm*, ___ U.S. ___, 112 S.Ct. 773, 778, ___ L.Ed.2d ___ (1992). *Dewsnup* holds that a secured creditor's interest extends beyond the right of immediate foreclosure, to encompass, at a minimum, the right to recover future appreciation of the collateral as well. The Ninth Circuit's reading of § 506(a) contradicts this teaching, holding that the value of the creditor's interest is only what the creditor would receive on immediate foreclosure and sale.

The Ninth Circuit's holding would also permit just the sort of windfall for debtors that *Dewsnup* held was unwarranted. 112 S.Ct. at 778. Under the Ninth Circuit's interpretation, a day after confirmation of a cram-down plan, a debtor could pay its creditor the wholesale value of its collateral, then sell the collateral at its retail value and pocket the difference—about $3,500 in this case. This approach emasculates congressional intent, giving the debtor

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[20] 11 U.S.C. §§ 1129(a)(7)(A), 1225(a)(4), 1325(a)(4).

[21] 11 U.S.C. §§ 1129(a)(7)(B), (b)(2)(A), 1225(a)(5), 1325(a)(5).

far more than the fresh start the Bankruptcy Code was intended to provide.

Finally, the Court of Appeals' reading would effect a major change in pre-Code bankruptcy practice when neither the statute nor the legislative history suggest Congress intended such a change. *See Dewsnup, supra,* 112 S.Ct. at 779. Under the Bankruptcy Act, cram-down plans were allowed only in Chapters X and XII,[22] under both of which the secured creditor was entitled to receive the value of its collateral computed on a going concern basis, unless the plan called for liquidation.[23] Neither § 506(a) nor its legislative history suggest that Congress intended the new reorganization chapters of the Code to reduce the secured credi-

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[22] Under the Bankruptcy Act, Chapter XI plans could not affect secured debts. 11 U.S.C. §§ 307(1), 356, 357(1) (1976 ed.); 9 Collier on Bankruptcy, ¶ 8.01[3], pp. 168-70 (14th ed. 1978). All creditors had to consent to Chapter XIII plans. 11 U.S.C. § 652(1) (1976 ed.); 10 Collier on Bankruptcy, *supra,* ¶ 29.02, p. 331. Some authorities did hold that the secured creditor could be denied the right to reclaim its collateral and be enjoined from foreclosing pending completion of the plan, so long as the creditor was paid the value of its security. *See, e.g., In re Moralez,* 618 F.2d 76, 79 & n. 2 (9th Cir. 1980); *In re Garcia,* 396 F.Supp. 518, 522-24 (C.D. Cal. 1974); Bankruptcy Rule 13-307 (1973). But these holdings remained controversial, and no settled practice developed under either Chapter XI or Chapter XIII for how to value a creditor's security.

[23] "[I]n reorganization where valuation is required and liquidation is not contemplated, the test of the 'fair value' of the property is the earning power of the corporation as a going concern. While 'value is a word of many meanings' the 'basic question in a valuation for reorganization purposes is how much the enterprise in all probability can earn.' " 6A Collier on Bankruptcy, *supra,* ¶ 10.13, pp. 62-67 (fns. omitted); *see* also Pachulski, *The Cram Down And Valuation Under Chapter 11 Of The Bankruptcy Code,* 58 N.C. L. REV. 925, 938-39 (1980). The same principle apparently applied in pre-Code Chapter XII proceedings since the same statutory language regarding treatment of secured claims in cram-down plans appeared in that chapter as in Chapter X. Compare 11 U.S.C. § 616(7) with *id.,* § 461(11) (1976 ed.); *see* 9 Collier on Bankruptcy, *supra,* ¶ 8.12, pp. 1079-80.

tor's rights below this pre-Code floor. Yet, that is what the Ninth Circuit read § 506(a) to require.

Correctly interpreted § 506(a) involves none of the complexities and contradictions apparent in the Ninth Circuit's reading. As this Court held in *Timbers*, the section's first sentence directs the court to determine "the value of the collateral," not the value of the creditor's right to foreclose on the collateral. 484 U.S. at 372, 108 S.Ct. at 631.

That sentence's reference to "the creditor's interest in the estate's interest" in the collateral is intended to deal with situations in which the estate owns less than a full fee interest in the collateral or the creditor has less than a full, first lien on the collateral. For example, if debtor is a co-owner of the property, or the creditor's lien is subordinate to another creditor's,[24] § 506(a)'s first sentence directs that creditor's claim is secured only to the extent of the portion of the collateral's value that is property of the estate and that is subject to the creditor's lien.

Read this way, § 506(a)'s first sentence does not conflict with its second sentence. The value of the collateral subject to the creditor's lien must be determined in light of the collateral's proposed disposition or use. If the proposed disposition or use is to return the property to the creditor or sell it, foreclosure or wholesale values may be appropriate. When the debtor proposes to retain and use the collateral, retail value should be used.

This reading of § 506(a) gives meaning to the separate protections given secured creditors in §§ 1129, 1225, 1325. It continues pre-Code bankruptcy practice. It avoids giving debtors unwarranted windfalls. It is consistent with this Court's decisions in *Timbers* and *Dewsnup*. It is the interpretation that this Court should adopt upon granting this petition.

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[24] *E.g., In re Sprecher*, 65 B.R. 598, 601 (Bankr. C.D. Ill. 1986) (creditor had lien on debtor's half interest in the collateral); *In re Jordan*, 5 B.R. 59, 61-62 (Bankr. D. N.J. 1980) (creditor held subordinate lien on debtor's interest as co-tenant by the entireties in the collateral).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. Upon review, this Court should reverse that judgment and direct the Ninth Circuit to reverse the judgment of the Bankruptcy Appellate Panel for the Ninth Circuit and direct that court to affirm the judgment of the bankruptcy court.

Respectfully submitted,

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Appendix A

In re George H. MITCHELL;
Carol J. Mitchell, Debtors.

GENERAL MOTORS ACCEPTANCE CORPORATION,
Appellant,

v.

George H. MITCHELL;
Carol J. Mitchell, Appellees.

No. 90-15952.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 13, 1991.

Decided Jan. 21, 1992.

Jan T. Chilton, Severson, Werson, Berke & Melchoir, San Francisco, Cal., for appellant.

James J. Gold, Gold & Hammes, San Jose, Cal., for appellees.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel.

Before GOODWIN, SCHROEDER and NOONAN, Circuit Judges.

SCHROEDER, Circuit Judge:

General Motors Acceptance Corporation (GMAC) appeals from the decision of the Bankruptcy Appellate Panel (BAP) which established the value of an automobile owned by George H. and Carol J. Mitchell. The purpose of the valuation was to determine the amount of GMAC's allowed secured claim in the Mitchells' Chapter 13 cram-down bankruptcy plan. A careful reading of the statutory language involved here, 11 U.S.C. § 506(a), and the overwhelming weight of authority support the outcome reached by the BAP. We affirm its use of the wholesale blue book valuation. We also affirm the BAP's holding that GMAC did not have a security interest in the mechanical service agreement the debtors had purchased with the car.

FACTS

On January 14, 1987, the Mitchells bought a 1987 Cadillac El Dorado, paying $5,000 down and signing a conditional sale contract under which they agreed to pay the remaining $26,940 plus interest at a rate of 11 percent annually in 60 monthly installments of $585. The purchase price included $695 for a 60-month, unlimited mileage, mechanical service contract under the General Motors Purchaser Protection Plan, a contract assumable by a subsequent purchaser of the car on payment of $25. The conditional sale contract gave the seller or its assignee "a security interest in the vehicle and all parts and accessories put on the vehicle" and in all insurance premiums or service contract premiums financed by the seller. On January 26, 1987, the seller assigned the contract to GMAC.

On March 4, 1988, the Mitchells filed a joint petition under Chapter 13. They proposed a plan under which they would pay their secured creditors, over time, the full value of their allowed claims, a projected total of $76,000 over 4½ years. They would pay unsecured creditors 10 percent of their allowed claims. The bankruptcy court confirmed the plan on May 11, 1988.

In April 1988, GMAC filed a claim as a secured creditor in the amount of $27,962.25. The Mitchells objected. At an evidentiary hearing George Mitchell testified that he was a commercial glass contractor and that this business was his sole source of income for making the payments required under the Chapter 13 plan. As part of his glass business he drove to customers' places of business either in his truck or in the Cadillac.

Two expert appraisers testified as to the value of the Cadillac. The Mitchells' expert testified that as of March 4, 1988, the Cadillac had a value of $20,761, based on low, or wholesale, Kelley Blue Book values. He stated that this is what the trustee in bankruptcy could reasonably expect to receive selling the Cadillac. The expert hired by GMAC testified that on March 4, 1988, the value of the Cadillac was $24,185, based on high, or retail, Kelley Blue Book values.

The bankruptcy court chose the value proposed by GMAC. To this value the court added the value of the mechanical service contract, which the court put at its original cost of $695.

The Mitchells appealed. The Bankruptcy Appellate Panel held that the Cadillac should have been valued at its wholesale value and further held that GMAC did not have a security interest in the mechanical service contract but only an interest in any return of premiums due on cancellation of that contract.

GMAC appeals to this court.

WHOLESALE OR RETAIL VALUATION

Neither the Supreme Court nor any circuit court has considered what standard should be used in a Chapter 13 proceeding to establish a creditor's allowed security interest in an automobile. The issue is a recurring one in the bankruptcy courts, so our decision is significant, at least in terms of the number of cases it may affect. The governing statutory provision is 11 U.S.C. § 506(a) which provides:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a *secured claim to the extent of the value of such creditor's interest in the estate's interest in such property,* or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. *Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property,* and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) (emphasis supplied).

The legislative history of this section is scant. It states only that "[w]hile courts will have to determine value on a case-by-case basis, the subsection makes it clear that valuation is to be determined in light of the purpose of the valuation and the

proposed disposition or use of the subject property." S.Rep. No. 989, 95th Cong., 2d Sess. 68 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin.News pp. 5787, 5854. Here the purpose of the valuation is to determine the value of GMAC's allowed secured claim which establishes the minimum amount that must be paid to GMAC under a Chapter 13 plan pursuant to 11 U.S.C. § 1325(a)(5)(B). The use of the property is to be by the debtor. GMAC understandably urges a retail, or higher, valuation standard, while the debtors, equally understandably, urge a wholesale valuation, which would be a lower valuation standard.

In cases posing this question, the vast majority of reported bankruptcy court decisions appear to have rejected the retail standard urged by GMAC. Cases are collected in 3 L. King, *Collier on Bankruptcy* 506.04, at 506-36 (15th ed. 1991) [hereinafter *Collier*]. The cases cited in Notes 48-52 nearly all apply the wholesale value, or a value roughly equivalent to it such as (a) "bid" market price or (b) retail price, less dealer overhead, commissions and profit. *Collier* explains that the courts in these cases are endeavoring to determine what the creditor would obtain if the creditor were to make a reasonable disposition of the collateral. *See Collier, supra,* at 506-27 to 506-36. It would appear to be the wholesale price which best approximates this value. This was the holding of the leading bankruptcy decision in this circuit, the BAP's opinion in *In re Malody,* 102 B.R. 745 (9th Cir. BAP 1989), which the BAP followed in this case.

The appellant relies principally on the statutory language calling for determination of value "in light of the proposed disposition or use of such property." The appellant contends that since the debtor intends to use the automobile, the value of the creditor's secured interest should be based upon the replacement cost to the debtor. The difficulty with this argument is that it ignores the clause of the statute that defines the value of the secured claim as the value of the "creditor's interest" in the property. One commentator has squarely and succinctly addressed GMAC's contention, noting that "[c]ourts have almost uniformly rejected this argument, emphasizing that what is being valued is the creditor's 'interest' in the collateral, not the debtor's interest." Queenan,

Standards for Valuation of Security Interests in Chapter 11, 92 Com.L.J. 19, 30 (1987).

In holding that the wholesale value should apply as a general rule in valuing vehicles, we do not suggest that the contemplated use by the debtor in Chapter 13 or Chapter 11 proceedings should never affect the valuation of the creditor's interest. *Collier* suggests that the so-called "going concern" or "replacement cost to the debtor" is appropriate where the collateral is being used as part of a going concern and the prospects for successful reorganization are good. *See Collier, supra,* at 506-28 to 506-29. In his article on this subject, Judge Queenan offers an even narrower application of debtor's use as a factor in valuation of the secured claim. He suggests that debtor's use should affect valuation where the use is "particularly beneficial," as for example when the collateral is being used in the debtor's hands in a more profitable way than it would in others' hands, or where the use is "particularly detrimental" to its value, as for example when the debtor is using the collateral 24 hours a day and causing rapid depreciation. Queenan, *supra,* at 37. GMAC does not argue that the debtor's use of the automobile in this case is in any way unusual. GMAC calls instead for an across-the-board application of the retail price to value security interests in automobiles in Chapter 13 proceedings. This result is unsupported both by the authorities discussed herein and by the language of the statute.

GMAC also contends there is support for its position in *United Savings Ass'n v. Timbers of Inwood Forest Associates,* 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). The issue in *Timbers* was whether, in determining the value of an undersecured creditor's collateral for purposes of 11 U.S.C. § 362(d)(1), the creditor was entitled to add on hypothetical interest that it was losing as a result if its inability to foreclose on the property because of the automatic stay. The Court held the creditor was not entitled to add on the interest. The Supreme Court's opinion in *Timbers* looks to section 506 by analogy, but does not suggest that the value of collateral should be determined by replacement cost to the debtor. Rather, *Timbers* measures the value of the creditor's interest as if the collateral were in the hands of the creditor. It concludes that the loss of the right of immediate foreclosure

caused by the debtor's retention of the collateral is not a factor to be considered in valuing the creditor's interest. *See* 484 U.S. at 371-72, 108 S.Ct. at 630. Thus, *Timbers* suggests that the value of collateral is to be determined by looking to the foreclosure value. *Cf. In re Balbus*, 933 F.2d 246, 250-52 (4th Cir. 1991) (where purpose of valuation was to determine whether debtor had too much unsecured credit to qualify as Chapter 13 debtor, and where debtor would retain and use his house, the value of creditor's secured interest in the house was set at amount creditor would receive at foreclosure sale). To the extent that *Timbers* has any relevance to this case, we conclude it supports the BAP's decision to use the wholesale valuation, representing the value the automobile would have in the hands of the creditor, rather than a value based on the replacement cost to the debtor.

THE SERVICE CONTRACT

We also agree with the BAP that the mechanical service contract value should not be included in GMAC's allowed secured claim. As the BAP pointed out, GMAC's claim is secured by an interest in both the automobile and the service contract premiums. The contract language does not grant GMAC a security interest in the service contract itself. The BAP therefore correctly held that if, on remand, GMAC can show any entitlement to a refund of premiums after repossession, such sum would be included in the valuation of the collateral, but that GMAC was not entitled to have the value of the contract itself included in the valuation of the collateral.

AFFIRMED.

NOONAN, Circuit Judge, dissenting:

The Bankruptcy Code provides:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to

> setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 US.C. § 506(a).

In the present case the "property" of the estate of the debtors is the 1987 Cadillac. The "interest of the estate" is the ownership and possession of the automobile. The "interest of the creditor," GMAC, is "a security interest", conferred by the conditional sales contract. The crux of the case is the value of this interest.

To an uninformed layman, "value" and "valuation" appear simple and unambiguous terms. The statute itself dispels such a misconception. The value of the creditor's interest depends upon its valuation, and, according to the second sentence of § 506(a), that valuation is to be done variously, in light of two factors, the purpose of the valuation and the use or disposition to be made of the interest.

The key fact is that the debtor is going to use the car. The wholesale price testified to by the Mitchells' expert is irrelevant. The debtor is not going to wholesale the Cadillac. There is no better way of arriving at its value "in the light of . . . its proposed use" than to determine the cost of providing a similar car. That figure is the high Blue Book figure. The statutory provision controls.

That the car is being used, at least in part, for George Mitchell's business is an equitable reason weighing in favor of this result. The use of the car generates income that will be of benefit to all the creditors. But even if the car were being used only for pleasure, its valuation, in accordance with the terms of the statute, would depend on its use and so require a valuation different from the wholesale price.

The difference, it is urged, is not great between the retail and the wholesale price. Why not restrict the creditor to what it could get by foreclosure if there were no bankruptcy? The answer is that we are not free to disregard the statute that controls what happens under the statutory scheme set up by bankruptcy. Bankruptcy

does equity only within the confines of the controlling law. *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206, 108 S.Ct. 963, 968, 99 L.Ed.2d 169 (1988). No windfall is given the creditor. GMAC's total claim is $27,062.25. GMAC is still undersecured when the high Kelley Blue Book figure is the measure of value.

United Savings Ass'n v. Timbers of Inwood Forest Associates, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988) supports, if it does not control, this result. There, the creditor sought interest on its collateral because the automatic stay prevented foreclosure. The Supreme Court unanimously held that the creditor could not get compensation for the debtor's use of the collateral. The issue before the Court was not the valuation of the collateral for the purpose of determining what amount of the claim was secured but what terms would protect the creditor's security interest. In a dictum relevant to our case, the Court noted that the creditor's interest under § 506(a) was its security interest considered apart from the right to foreclose. Analogously in our case the right to foreclose does not control the value. What is controlling is the value of the security interest as it is used.

I respectfully dissent.

Appendix B

BAP No. NC-89-1222-JVAs
Bk. No. 588-1134-JRG

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:

GEORGE H. MITCHELL and
CAROL JOANN MITCHELL,
Debtors.

GEORGE H. MITCHELL and
CAROL JOANN MITCHELL,
Appellants,

vs.

GENERAL MOTORS ACCEPTANCE CORPORATION,
Appellee.

AMENDED MEMORANDUM

Submitted without Oral Argument[1]
September 21, 1989 at San Francisco

Filed: June 15, 1990

Appealed from the United States Bankruptcy Court
for the Northern District of California

Honorable James R. Grube, Bankruptcy Judge, Presiding

Before: JONES, VOLINN and ASHLAND,
Bankruptcy Judges

George and Carol Mitchell appeal the bankruptcy court's order allowing GMAC's secured claim in the amount of $24,880.00. We reverse.

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[1]The Panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Federal Rule of Appellate Procedure 34(a).

FACTS

On January 14, 1987, the Debtors, George and Carol Mitchell, purchased a 1987 Cadillac and a mechanical service contract. The car and service contract were purchased with financing obtained from the Appellee, General Motors Acceptance Corporation ("GMAC"). GMAC has a perfected security interest in the car and the service contract premiums.

On March 4, 1988, the Debtors filed a petition for relief under Chapter 13 of the Bankruptcy Code. Shortly thereafter, GMAC filed a proof of claim alleging that $24,745.00 was owed it at the time of filing of the Debtor's petition.[2] This sum included the retail valuation of the car for $24,050.00 by the Kelley Blue Book for March and April of 1988, and the purchase of the mechanical service contract for $695.00. The Debtors objected to GMAC's claim, arguing that GMAC's secured claim should not exceed $20,761.00 which the Debtors claim is the fair market value of the security. Implicit in this argument is the Debtors' belief that GMAC does not have a security interest in the service contract.

On January 6, 1989, a trial was held to determine the value of GMAC's security. After considering the variety of different standards that have been applied by courts in determining a secured creditor's allowed secured claim under 11 U.S.C. § 506(a), Judge Grube concluded that GMAC's allowed secured claim in the vehicle was $24,185.00. Judge Grube also concluded that since a mechanical service contract adds value to a car GMAC was entitled to the fair market value of the service contract. Accordingly, GMAC was allowed to add an additional $695.00, the value Judge Grube placed on the service contract, to its secured claim. Debtors timely appealed.

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[2]GMAC's original secured claim was for $27,893.00. This amount reflected the additional cost to GMAC of placing single interest insurance on the car of $3,148.00. However, the court subsequently concluded that since the insurance was placed on the car after the Debtors filed their Chapter 13 petition the $3,148.00 claim would be treated as an administrative priority claim. The Debtors do not dispute this finding.

STANDARD OF REVIEW

Resolution of this appeal requires the Panel to interpret various sections of the Bankruptcy Code. Such interpretations are reviewed *de novo*. *Trustees of Amalgamated Ins. Fund v. Geltman Industries*, 784 F.2d 926, 929 (9th Cir. 1986) (interpretation of a statute is a question of law reviewed *de novo*).

DISCUSSION

a. Whether the value of GMAC's allowed secured claim should be based on the retail value of the car.

Section 506(a) of the Bankruptcy Code provides the basis for determining the value of a secured creditor's allowed secured claim. Section 506(a) provides, in pertinent part:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) (1989).

Thus, a creditor's claim is secured to the extent of the value of the creditor's interest in the collateral. The balance of the creditor's claim is unsecured. Since there is no fixed valuation formula to determine the amount of a creditor's secured claim throughout a bankruptcy proceeding, each valuation must reflect the purpose for which the valuation is made. Specifically, the legislative history of § 506(a) states that "while courts will have to determine value on a case-by-case basis, the subsection makes it clear that valuation is to be determined in light of the purpose of the valuation and the proposed disposition or use of the subject property." S. Rep. No. 989, 95th Cong., 2d Sess. 68 (1978).

In the instant case, the purpose of determining the value of GMAC's allowed secured claim is to ascertain the minimum amount to be paid to GMAC under the Debtors' plan pursuant to 11 U.S.C. § 1325(a)(5)(B). Section 1325 sets forth the requirements to be satisfied in order for a Chapter 13 plan to be confirmed. Specifically, subsection (a)(5)(B) places certain restrictions on the confirmation of a Chapter 13. Subsection (a)(5)(B) provides:

> (a) Except as provided in subsection (b), the court shall confirm a plan if —
>
> (5) with respect to each allowed secured claim provided by the plan —
>
> (A) the holder of such claim has accepted the plan;
>
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
>
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or
>
> (C) the debtor surrenders the property securing such claim to such holder; . . .

11 U.S.C. § 1325(a)(5)(B) and (C) (1989).

Since GMAC retained its lien securing its allowed secured claim pursuant to § 1325(a)(5)(B)(i), the amount of its secured claim must be determined pursuant to § 1325(a)(5)(B)(ii). In doing so, the legislative history of § 1325 clearly indicates that the allowed secured claim is to be determined under § 506(a). H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 430 (1977). As noted § 506(a) defines the value of a creditor's allowed secured claim as "the creditor's interest in the estate's interest in the property." 11 U.S.C. § 506(a) (1989). Thus, a secured creditor's allowed claim should be equal to the lesser of the creditor's interest in the property or the estate's interest in the property.

In cases where the debtor intends to retain the car and continue to use it, courts have applied various formulas in determining the

value of a creditor's allowed secured claim. *See In re Malody*, 102 B.R. 745, 749 (9th Cir. BAP 1989) (a car should be valued according to its wholesale value in the absence of other evidence); *In re Reynolds*, 17 B.R. 489, 494 (Bankr. W.D. Ga. 1981) (a car should be valued according to its present retail replacement cost); and *Virginia National Bank v. Jones (In re Jones)*, 5 B.R. 736, 738 (Bankr. E.D. Va. 1980) (a car should be valued according to the average between its wholesale and retail value). *See also* 3 *Collier on Bankruptcy* § 506.04[2], at 506-36 to 37 (15th ed. 1989).

In the instant case, each party contends that its interpretation of § 506(a) is the appropriate calculation of value. Specifically, Debtors argue that the proper value of GMAC's secured claim should be what it would receive for the car if it repossessed and sold it. This appears to be the wholesale value or that which would be obtained by GMAC in a "commercially reasonable" sale.[3]

In the alternative, GMAC suggests that for purposes of § 506(a), its allowed claim should reflect the car's retail sale value. GMAC's argument is premised upon its contention that the repossession, wholesale and mid-blue book valuations are all inappropriate. GMAC contends that since the Debtors are retaining the car for their own use the retail sale value best reflects the value of the car to the estate. *In re Crockett*, 3 B.R. 365, 367 (Bankr. N.D. Ill. 1980). Furthermore, GMAC cites *In re Reynolds*, 17 B.R. 489 (Bankr. N.D. Ga. 1981) for the proposition that the continued use of the car by the Debtors demands that the car's value be fixed at retail value. *In re Reynolds*, 17 B.R. at 493. In support of this contention, GMAC argues that the replacement cost is the appropriate measure of value because of the following language of § 506(a): "Such value shall be determined in light of . . . the proposed . . . use of such property." 11 U.S.C. § 506(a) (1989). The proposed use in this case is the personal use of the car by the Debtors. Accordingly, GMAC argues, that since the

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[3]Notwithstanding the difference in terminology, we believe that there is not an actual difference between what GMAC would receive if it repossessed the car and sold it and the car's wholesale value.

value of the car to the Debtors is equal to the cost of replacing the car, the replacement cost, i.e., retail value, is the appropriate measure of value.[4]

The court, in the instant case, agreed with this analysis and, based on its determination of the use and the proposed disposition of the property, concluded that GMAC was entitled to the equivalent of the retail value rather than wholesale value of the car.

While we acknowledge that under unusual circumstances the appropriate measure of value may be something other than the wholesale value, this is not such a case.[5] Accordingly, we must respectfully disagree with the analysis relied upon by Judge Grube and in doing so find the analysis in *In re Cook*, 38 B.R. 870 (Bankr. D. Ut. 1984) and *In re Malody, supra*, controlling in this case.

In *Cook*, the court concluded:

> The purposes of collateral valuation under Section 1325(a)(5)(B)(ii) is not to assume that secured claimants will receive under the plan as much money as debtors would have to spend to replace the collateral. Instead, the purpose of collateral valuation under Section 1325(a)(5)(B)(ii) is to protect secured claimants from loss by assuring that they will receive under the plan as much money, or its equivalent, as they would receive if they were permitted to sell the collateral in a commercially reasonable manner [footnote omitted]. *Replacement cost is not an appropriate standard.*

In re Cook, 38 B.R. at 873. (emphasis added).

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[4]Again, notwithstanding the difference in terminology, we believe that GMAC is using replacement cost interchangeably with retail value.

[5]*See Sears, Roebuck & Co. v. Anderson*, 17 B.R. 521, 523 (Bankr. S.D. Ohio 1982) (because of the special use of the collateral, custom made drapes, the proper valuation for security purposes should be its amortization value).

This conclusion was confirmed in *Malody*, which adopted the following language from *Cook* when it concluded that the wholesale value was the appropriate valuation standard under § 1325(a)(5)(B)(ii):

> Most often in a consumer case, a secured creditor has a security interest in property that is virtually worthless to anyone but the debtor. The creditor obtains a security interest in all of the debtor's furniture, clothes, cooking utensils, and other personal effects. These items have little or no resale value. They do, however, have a high replacement cost. The mere threat of repossession operates as pressure on the debtor to pay the secured creditor more than he would receive were he actually to repossess and sell the goods.

Malody, 102 B.R. at 750.

Thus, concurring with the remedies announced in *Cook* and *Malody*, we hold that the valuation provisions of § 1325(a)(5) require Chapter 13 debtors to pay as a secured claim only the amount the secured creditor will receive upon repossession and sale of the collateral. In this context, the value of the car should be its wholesale value or what GMAC will receive from selling the car in a commercially reasonable manner.[6] The remaining balance of the claim should be paid along with other unsecured claims.

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[6]The holding in this case does not prohibit a secured creditor from presenting evidence on its usual commercially reasonable method of selling cars. Implicit in this disclaimer is the idea that a court should fix an amount based on evidence showing the price obtainable at such a sale, less sales cost, such as advertising and commission. In the instant case, the evidence presented clearly establishes that GMAC should be allowed as a secured claim an amount equal to what it would receive if it repossessed the car and sold it minus the cost of such a sale. More precisely, this would be the amount the car would bring in a commercially reasonable sale or stated another way its wholesale value.

b. Whether the value of the mechanical service contract should be included in GMAC's allowed secured claim.

GMAC's claim is secured by a security interest in both the service contract premiums and the automobile itself. The contract provision creating this security interest reads in pertinent part:

> You grant [GMAC] a security interest under the California Uniform Commercial Code in the vehicle and all parts or accessories put on the vehicle and in all . . . service contract premiums . . . which security interest secures all sums which may become due under the contract.

However, nothing in this language explicitly grants GMAC a security interest in the service contract. Upon repossession, GMAC would be entitled only to a return of premiums due to cancellation of the contract. Accordingly, upon remand, GMAC may be able to demonstrate entitlement to a refund of premium after repossession. Upon the latter showing the court should include the amount of any such premium refund in the valuation of the collateral.

CONCLUSION

The order of the bankruptcy court allowing GMAC's secured claim in the amount of $24,880.00 is REVERSED and the matter is REMANDED for further proceedings consistent with this opinion.

Appendix C

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

Chapter 13
Case No. 588-02162-JRG

In re:

LAURA MADDEN;
Debtor.

Chapter 13
Case No. 588-01134-JRG

In re:

GEORGE H. MITCHELL and
CAROL JOANN MITCHELL,
Debtors.

Filed: February 2, 1989

Paul C. Karney, Jr., Clerk
United States Bankruptcy Court
San Jose, California

ORDER ON DEBTORS' OBJECTIONS TO CLAIMS OF GENERAL MOTORS ACCEPTANCE CORPORATION

By an Order of this Court made on December 12, 1988 the Objection of LAURA MADDEN to Claim No. 6 of General Motors Acceptance Corporation and the Objection of GEORGE and CAROL MITCHELL to Claim No. 18 of General Motors Acceptance Corporation were consolidated for the purpose of conducting an evidentiary hearing on the common issues of fact and law which were raised by such objections. An evidentiary hearing was conducted before this Court on January 6, 1989. The debtors were represented by James Gold of the law firm of Gold & Hammes and General Motors Acceptance Corporation was represented by Bernard S. Greenfield of the law firm of Levy, Greenfield & Davidoff. After considering the evidence presented, the Points and Authorities submitted by the parties, and the oral argument of counsel, the Court rendered its decision and, pursu-

ant to Bankruptcy Rule 7052 and Federal Rule 52, made its findings of fact and conclusions of law orally on the record.

Good cause appearing, with respect to the case of GEORGE and CAROL MITCHELL, IT IS HEREBY ORDERED that:

1. Claim No. 18 of General Motors Acceptance Corporation is allowed as a secured claim in the amount of $24,185.

2. The value of the Mechanical Service Contract is $695 and that amount is to be added to the allowed secured claim of General Motors Acceptance Corporation.

3. Single Interest Insurance placed by General Motors Acceptance Corporation after the filing of the Chapter 13 Petition is entitled to be treated as an administrative expense priority claim and General Motors Acceptance Corporation is authorized to amend and supplement its claim to set forth that part of its claim pertaining to Single Interest Insurance. The Debtor shall have the right to bring such objection to this claim as may be appropriate.

4. Any remaining amounts of the claim of General Motors Acceptance Corporation shall be treated as a general unsecured claim.

Good cause appearing, with respect to the case of LAURA MADDEN, IT IS HEREBY ORDERED that:

1. The motion of General Motors Acceptance Corporation to overrule the objection to Claim No. 6 on the grounds of the Debtor's failure to make the subject vehicle available to General Motors Acceptance Corporation for appraisal pursuant to the Court's previous order made on December 12, 1988 is granted and the Objection is overruled.

DATED: February 2, 1989.

/s/ JAMES R. GRUBE

UNITED STATES BANKRUPTCY JUDGE

Appendix D

Case No. 588-01134-JRG
San Jose, CA
January 6, 1989
12:25 p.m.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:

GEORGE H. MITCHELL, et al.,
Debtors.

TRANSCRIPT OF PROCEEDINGS
OBJECTION TO CLAIM OF GMAC

BEFORE THE HONORABLE JAMES R. GRUBE
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors:	JAMES GOLD, ESQ. 111 West St. John Street Suite 750 San Jose, CA 95113
For the Creditor:	BERNARD GREENFIELD, ESQ. 80 South Market Street Third Floor San Jose, CA 95113
Court Recording Reporter:	MS. TERI MILLER 280 South First Street Third Floor San Jose, CA 95113

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

(Call to order of the court.)

THE COURT: Be seated, please. And Clerk, can we call the Madden and Mitchell matters, first?

THE CLERK: Number 1, Laura Madden; and No. 2, George and Carol Mitchell.

THE COURT: Give the appearances of counsel, again, for the record.

MR. GOLD: Yes. James Gold for the debtors.

MR. GREENFIELD: Bernard Greenfield on behalf of the secured creditor, General Motors Acceptance Corporation.

THE COURT: All right. Counsel, the Court has reached a decision on the objection. As I indicated earlier, the Court will explain its reasoning and that will take a few moments, so I would like you to take a seat at the counsel table.

By the Court's order dated December the 12th, 1988, the objection of Laura Madden to Claim No. 6 of GMAC and the objection of George and Carol Mitchell to Claim No. 18 of GMAC were consolidated for hearing purposes because of common issues of fact and law which were involved. That order set forth a number of issues which the Court believed were involved in the two cases.

Both of those cases involve automobiles where the parties agree that the contract balance to GMAC exceeds the value of the automobile. That is, GMAC has both a secured and an unsecured claim, which have to be determined.

In the majority of cases, the allowed amount of the secured claim of the lien holder, such as GMAC, is determined through negotiation. However, that seems to have been impossible in these cases.

The Court has received the impression, perhaps erroneously, that these cases were being utilized as test cases with respect to one or more of the issues raised. The Court recognizes that counsel for the debtor files a substantial number of Chapter 13 petitions annually, and GMAC is certainly involved in many cases which come before the Court.

At the end of last year, December 31st, 1988, the San Jose division of the Northern District had 6,884 Chapter 13 cases pending and 2,409 Chapter 13 petitions were filed during 1988.

Almost all such cases involve at least one vehicle and it is not uncommon for many cases to involve a number of vehicles, as is the situation in the Mitchell case.

The Court also recognizes that the issues before the Court are further complicated by the fact that many of the claims involve relatively expensive vehicles. The fact that such automobiles depreciate rapidly is a fact which cannot be reasonably denied.

The Mitchell case involves a 1987 Cadillac El Dorado. And the debtors also included in their filing a 1987 Honda Prelude and a 1986 Nissan pickup truck.

The Court also had on its calendar this morning the Townsend case, which involved a Chevrolet Corvette, purchased approximately two months prior to the filing of the petition.

The Silicon Valley seems to spawn much more expensive vehicles than those involved in many of the reported cases around the country involving automobiles. In addition, the recent insurance crisis in California has meant that many debtors have encountered severe difficulty in obtaining the insurance required by their purchase contracts, resulting in single-interest insurance being placed on a particular vehicle by the secured creditor.

The issues before the Court in these two cases relate to valuation standards to be utilized in the case where the secured creditor is undersecured. Despite the singular focus of an objection to claim, the Court cannot close its eyes and ignore the fact that automobile issues arising in Chapter 13 cases are interrelated. The decisions made with respect to determining the allowed amount of the secured party's claim will, in all probability, also have an impact on other aspects of the case, such as plan confirmation and adequate protection.

To provide for a fair treatment of debtors and creditors alike, a number of issues relating to automobiles in the Chapter 13 context should be analyzed and considered as an integrated whole. Based upon those considerations, the Court will set forth its analysis of the interrelated issues in the Chapter 13 context; which analysis underlies the Court's decision on some of the issues involved in the objection to the GMAC claims.

The first issue is the date of evaluation. Although not raised directly in the objection to the claim, but discussed in the pleadings, one of the interrelated issues which should be considered is the date as of which the allowed claim of GMAC should be determined. A few courts have taken the approach that the allowed secured claim is to be determined as of the effective date of the plan. See In Re: Cook at 38 BRH 70.

In the Cook case, the Court seemed to be dealing in a factual setting in which the automobile claims were normally filed, objected to, and all determinations made in connection with the confirmation of the plan. In order to compensate the secured creditor for the depreciation which occurs between the petition date and the confirmation date, the Cook court suggested that secured creditors could always file a motion seeking adequate protection payments during this gap period.

The circumstances which exist in the District of Utah, that's the Cook district, and many other districts throughout the country seem to differ vastly from those in this district in terms of the volume of cases filed and the procedures which have been developed over the years to expeditiously handle that volume.

However, the Cook approach of determining the allowed secured claim on the effective date of the plan or at the time of the confirmation hearing has been criticized. See Bowman and Thompson (phonetic) secured claims under 1325(A)(5)(b), collateral valuation, present value, and adequate protection, 15 Indiana Law Review 569.

A secured claim is determined in accordance with Section 506 of the Bankruptcy Code. And Section 506 provides for claims to be determined at different times and in light of the purpose of the valuation and the proposed distribution or use of the property involved.

Since 506 is not specific as to when the amount of the secured claim should be determined, the timing of the valuation is, then, controlled by Section 502(B) of the code, which provides that the allowed amount of a claim is to be determined as of the date of the filing of the petition. This is not inconsistent with Section 1325(A)(5)(b)(2). There are two separate and distinguish-

able events which are involved. The first event is the determination of the allowed amount of the secured claim. This is as of the petition date based upon Sections 506 and 502.

The second event is the determination of the present value payments to be made upon the allowed secured claim, which determination is made at the time of confirmation under Section 1325.

At the time of confirmation, the Chapter 13 debtor has three cram-down options regarding a secured creditor; pay the allowed secured claim in full and in cash; surrender all of the collateral to the secured creditor; or provide a distribution of property or string of payments, which has a present value equal to the allowed secured claim. It is the property or string of payments to be distributed under the plan, which, under Section 1325(A)(5)(b)(2), is valued as of the effective date.

Determining the allowed secured claim as of the petition date is consistent with the protection concepts of the Bankruptcy Code. Section 103 of the code provides that Chapter 3, containing the adequate protection requirements of Section 361, applies to cases under Chapter 13.

Section 1325(A)(1) conditions confirmation on compliance with all provisions of Chapter 13, as well as with all other applicable provisions of Title 11.

Some courts have construed the adequate protection requirements set forth in Section 363(E) as being inherent in the confirmation issues raised under Section 1325(A)(5). See In Re: Cooper at 7 BR 537. Viewed in terms of adequate protection, there would seem to be a fundamental proposition underlying Chapter 13 that a secured creditor is entitled to realize the value of its allowed secured claim as it existed at the time of the filing of the petition.

As mentioned before, the Cook court suggested, in essence, that every automobile lien holder should immediately file an adequate protection motion and obtain adequate protection payments to protect its position with respect to the depreciation

which will, undoubtedly, occur between the petition date and the confirmation date.

In this district, automobile payments are made through the office of the Chapter 13 trustee. And the trustee makes no disbursements until after confirmation of the plan, which means that, generally, creditors do not receive any payments for at least three months.

To require several thousand adequate protection motions to be filed to protect the secured creditor's position during this gap period would seem to have little purpose other than to unnecessarily increase the legal costs to both the debtor and the secured creditor in the case. Such approach seems particularly unfair to the secured creditor whose claim, under 506, is going to be separated into a secured claim and an unsecured claim with the unsecured claim often paid at ten percent, five percent, or less on the dollar.

From a practical point of view, if the allowed secured claim is determined as of the petition date and all payments made to the secured creditor thereafter are credited against the allowed secured claim, then the secured creditor is adequately protected while, at the same time, the debtor has not been required to make payments to the secured creditor in excess of the allowed amount of the secured claim.

In theory, assuming that the present value payments at least equal the monthly depreciation on the vehicle, the secured creditor is whole at all times in that the payments received, coupled with the residual value of the vehicle, should equal the allowed amount of the secured claim. From the perspective of the debtor, the debtor has neither overpaid nor underpaid the secured creditor.

The second issue is the standard for valuation. It should, first, be recognized that there are three separate methods by which the allowed amount of the secured claim can be determined. First, Section 1325 allows confirmation where the holder of a secured claim has accepted the plan; in essence, an agreement as to how the secured creditor is to be treated. Secondly, the allowed amount of the secured claim could be determined by the Court

based upon a hearing utilizing either the Kelley Blue Book or a similar guide, such as is used in other jurisdictions — the NADA officially used car guide. The Court believes that such guides are admissible as an exception to the hearsay rule. See Evidence Rule 803, sub 17, dealing with market reports, market quotations, and the like.

In the absence of additional evidence being presented, the Court would have to then determine the value with, almost assuredly, the creditor arguing the high blue book value and the debtor arguing the low blue book value. Such guides tend to track sales made by automobile dealers and do not reflect other normal means for the sale of vehicles such as sales in the private market where vehicles are sold through newspaper advertising and the like. It is probable that the private market, the average sales price would be somewhat lower than retail dealer prices, given the fact that dealers must provide for sales commissions and other operating costs for their facilities.

Assuming only this evidence was presented to the Court, it is probable that the median value between retail and wholesale values would most accurately approximate that open market value which would be realized by a sale in a private market. See In Re: Miller at 4 BR 392.

The third alternative is an evidentiary hearing under Section 506, where evidence, such as expert testimony, is presented with respect to the value of the particular automobile. It is in this context that the standard of definition of value most certainly arises. Numerous courts have wrestled with this question. All recognize the seemingly clear language in Section 506(A) which states that value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property.

Again, courts, almost universally, agree that the determination must be made on a case-by-case basis. Some courts have looked at the situation from the point of view of the secured creditor, asking what the secured creditor would realize if a particular vehicle were repossessed and then sold. See In Re: Cook that I cited previously. Other courts have, simply, stated this is not what is, in fact, happening; the debtor is electing to retain the vehicle

for its future use over the course of the plan, which use enhances the debtor's ability to perform the terms of the plan. Such election by the debtor forces the creditor into an extension of the loan in which the creditor is protected only by the court's valuation of the particular vehicle.

A variety of cases have discussed replacement costs to the debtor, growing concern value, and a liquidation of the vehicle in the context where any reasonable seller would attempt to obtain the highest price available in the marketplace. See In Re: Davis at 14 BR 226; In Re: Frost, 47 BR 961; and In Re: Crocket, 3 BR 365.

The most reasonable and logical approach would seem to be to recognize what is factually happening in the case. That is: The vehicle is not being liquidated and sold by the secured creditor, but, rather, being kept by the debtor for its continued use throughout the term of the plan.

In such circumstances, the Court believes that a forced sale wholesale or quick liquidation standard of value is not appropriate. Rather, a measure of values should be utilized which more closely reflects the proposed disposition or use of such property as is described in Section 506.

Recognizing that a substantial private sale market exists for automobiles, the Court adopts as the appropriate standard of value, the net recovery from a private sale conducted within a reasonable period of time between a willing buyer and a willing seller and after deducting all reasonable costs of sale.

Next is the question of the mechanical service contract. GMAC has included within its claim the cost of a mechanical service contract, which is similar to an extended warranty, the cost of which contract was financed by GMAC along with the vehicle, itself. GMAC argues that the mechanical service contract is included contractually within its security interest and that such cost should, therefore, be part of its allowed secured claim. The debtor argues that the mechanical service contract adds no value to the vehicle and that the cost of such contracts should, therefore, be part of GMAC's unsecured claim to be paid at a rate

of ten cents on the dollar in the Mitchell case and five cents on the dollar in the Madden case.

The Court, simply, cannot agree that a mechanical service contract does not add value to the automobile. Such have become a fact of modern life. In these cases, the debtors have elected to retain the vehicle for their future use, which, the Court can believe, only enhances their ability to perform under the terms of the plan. As a general principle, it cannot be disputed that automobiles require more repairs as they grow older. To say, therefore, that a service contract does not have value to the debtor with respect to the use to which the debtor has elected to put the automobile and that such a benefit does not enhance the debtor's ability to perform the plan is, simply, an argument that has no foundation in logic.

Such contracts are, similarly, transferable in the event the debtor chooses to sell the automobile at a later date. To, again, say that the mechanical service contract has no value in the event of such sale is, likewise, without a logical foundation. See the matter of Reynolds 17 BR 489. The fair market value of the mechanical service contract is, therefore, part of the allowed secured claim of GMAC.

The proof of claim filed by GMAC constitutes prima facie evidence of the validity of such a claim, including the amount of the mechanical service contract set forth therein. The debtor has the burden of going forward with evidence to rebut the presumption of validity, which, in this instance, amounts to demonstrating that the present fair market value of the mechanical service contract is less than the cost of such contract as set forth in the proof of claim.

With respect to single-interest insurance, the next issue involves single-interest insurance placed by GMAC following a default by the debtor with respect to its own insurance coverage. The contract between the debtor and GMAC requires the vehicle to be insured at all times and authorizes GMAC, following a default by the debtor, to place its own single-interest insurance on the automobile. In the Mitchell case, such default occurred shortly after the filing of the Chapter 13 petition and in the

Madden case, the default occurred prior to the filing of the petition.

Single-interest insurance placed by GMAC is, in essence, a monthly insurance contract. At any given point in time, should the debtor re-acquire its own insurance and give proof of such insurance to GMAC, GMAC then cancels its single-interest insurance and receives a refund of the unused portion of such premium. The cost of such single-interest insurance and the amount of the refund is determined by the number of months which the policy is enforced. GMAC contends that the cost of single-interest insurance, whether placed pre- or post-petition, should be includable in its allowed secured claim. The debtor, on the other hand, contends that such single-interest insurance has no value and should, therefore, be only includable in the un-secured portion of GMAC's claim, regardless of whether the default occurred before of after the filing of the petition.

While single-interest insurance protects the position of the secured creditor and is authorized under the terms of the contract, thereby assisting the debtor to remain in compliance with the terms of such contract, the insurance, in and of itself, does not add any value to the automobile. As such, the cost of single-interest insurance, whether placed before or after the filing of the petition, is not includable in the allowed secured claim of GMAC.

However, such insurance is in the nature of an executory contract and relates to the providing of benefits and services to the debtor after the filing of the petition. This is true whether or not the debtor's default occurred and the single-interest insurance was placed before or after the filing of the petition.

Section 1305 of the code provides for the filing and allowance of a claim for consumer debt incurred for services necessary for the debtor's performance under the plan. Consumer debt is defined under the code as a liability or claim incurred by an individual, primarily for personal, family, or household purposes. See 11 USC Sections 101 sub 7 and sub 11.

As the debtor has elected to retain the vehicle during the term of the plan and as the Court concludes that such retention enhances the ability of the debtor to perform the terms of the plan

— a benefit to the debtor, the estate, and creditors, alike — the ongoing monthly cost of such single-interest insurance is, therefore, the type of debt falling within the scope of Section 1305 and should be given an administrative expense priority treatment in terms of payment. See In Re: Gamma Fishing Company, Inc. (phonetic), as 70 BR 949.

As to the case of George and Carol Mitchell, the Court finds the Chapter 13 petition was filed on March 4, 1988, and the debtors' Chapter 13 plan was confirmed on May 2nd, 1988. The evidence presented by both the debtors and GMAC valued the subject vehicle, as of March 4, 1988. Based upon the evidence presented, the Court finds that the value of the vehicle, for the — for purposes of determining the allowed amount of the secured claim of GMAC, is $24,185. Based on the evidence presented, the Court finds that the value of the mechanical service contract is $695 and that that amount is to be added to the allowed secured claim of GMAC.

The single-interest insurance was placed by GMAC post-petition and such insurance remains in effect as of this date. As the Court has concluded that single-interest insurance is not part of the secured claim of GMAC and, also, that such single-interest insurance post-petition is entitled to an administrative expense priority, GMAC is authorized to amend and supplement its claim to set forth that part of its claim pertaining to single-interest insurance. The debtor shall have the right to bring such objection to that claim as appropriate.

As to the remaining amounts of GMAC's claim, such amounts shall be treated as a general unsecured claim.

The foregoing shall constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Federal Rule 52. Counsel for GMAC is directed to prepare a proposed form of order in conformity with the Court's ruling and to lodge the same with the Court within ten days. Such order need not recite the findings of fact and conclusions of law which the Court has made orally on the record.

With respect to the case of Laura Madden, the Court has considered the motion of GMAC to overrule the objection on the

grounds of the debtor's failure to make the subject vehicle available to GMAC for appraisal pursuant to the Court's previous order of December 12, 1988. The Court has considered the declaration of Splend A. Splendorio (phonetic) in support of such motion together with the arguments of counsel. The motion of GMAC is granted and the objection of the debtor is overruled. Counsel for GMAC is directed to prepare a proposed form of order in conformity with this ruling to be lodged with the Court within ten days.

Counsel, that concludes the Court's decision. Thank you very much.

MR. GOLD: Thank you, Your Honor.

MR. GREENFIELD: Thank you, Your Honor.

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

DATED: January 12, 1989

MOON ELECTRONIC RECORDING/
TRANSCRIBING SERVICE

BY ALISON A. MOON
ALISON A. MOON

Appendix E

Lower court decisions holding that, under 11 U.S.C. § 506(a), collateral which a debtor proposes to retain and use should be valued at retail value or fair market value without deducting costs of sale:

1. *In re Balbus*, 933 F.2d 246, 248-51 (4th Cir. 1991) (Chapter 13 amount of unsecured debt; home).
2. *In re Beacon Hill Apartments, Inc.*, 118 B.R. 148, 150-52 (N.D. Ga. 1990) (Chapter 11; apartment building).
3. *In re Case*, 115 B.R. 666, 669-70 (9th Cir. BAP 1990) (Chapter 12; farm).
4. *In re Martindale*, 125 B.R. 32, 36 n. 3 (Bankr. D. Idaho 1991) (Chapter 12; farm).
5. *In re Bellamy*, 122 B.R. 856, 862 (Bankr. D. Conn. 1991) (Chapter 13 lien stripping; home).
6. *In re Landing Associates, Ltd.*, 122 B.R. 288, 294 (Bankr. W.D. Tex. 1990) (Chapter 11; apartment building).
7. *In re Cobb*, 122 B.R. 22, 26 (Bankr. E.D. Pa. 1990) (Chapter 13; home).
8. *In re Spacek*, 112 B.R. 162, 164 (Bankr. W.D. Tex. 1990) (Chapter 11; mining leases).
9. *In re Usry*, 106 B.R. 759, 760-62 (Bankr. M.D. Ga. 1989) (Chapters 11 and 12; real property).
10. *In re 222 Liberty Associates*, 105 B.R. 798, 802-04 (Bankr. E.D. Pa. 1989) (Chapter 11; commercial building).
11. *In re Felten*, 95 B.R. 629, 630 (Bankr. N.D. Iowa 1988) (Chapter 12; farm).
12. *In re Gerhardt*, 88 B.R. 151, 153-54 (Bankr. S.D. Ohio 1987) (Chapter 13; home).
13. *In re Bellman Farms, Inc.*, 86 B.R. 1016, 1019 (Bankr. D. S.D. 1988) (Chapter 12; farm).

14. *In re Courtright,* 57 B.R. 495, 496-97 (Bankr. D. Or. 1986) (Chapter 12; farm).

15. *In re Reynolds,* 17 B.R. 489, 492-93 (Bankr. N.D. Ga. 1981) (Chapter 13; car).

16. *In re Anchorage Boat Sales, Inc.,* 4 B.R. 635, 638-39 (Bankr. E.D. N.Y. 1980) (Relief from stay in Chapter 11; boats held as inventory by debtor).

Lower court decisions holding that under 11 U.S.C. § 506(a) collateral which a debtor proposes to retain and use should be valued at wholesale value or fair market value deducting costs of sale:

17. *In re Mitchell,* 954 F.2d 557, 560 (9th Cir. 1992) (Chapter 13; car).

18. *In re George Ruggiere Chrysler-Plymouth, Inc.,* 727 F.2d 1017, 1020 (11th Cir. 1984) (Chapter 11; cars in inventory).

19. *Grubbs v. National Bank of South Carolina,* 114 B.R. 450, 451 (D. S.C. 1990) (Chapter 13; car, mobile home).

20. *In re Malody,* 102 B.R. 745, 748-50 (9th Cir. BAP 1989) (Chapter 13; car).

21. *In re Coby,* 109 B.R. 963, 965 (Bankr. D. Nev. 1990), *aff'd* 126 B.R. 593, 594-96 (D. Nev. 1991) (Chapter 13; home).

22. *In re Weber,* ____ B.R. ____, 1992 WL 120156 (Bankr. S.D. Ohio 1992) (Chapter 13; home).

23. *In re Overholt,* 125 B.R. 202, 213-16 (S.D. Ohio 1990) (Chapter 12; farm).

24. *In re Waters,* 122 B.R. 298, 301-03 (Bankr. W.D. Tex. 1990) (Redemption in Chapter 7; furniture).

25. *In re Owens,* 120 B.R. 487, 490 (Bankr. E.D. Ark. 1990) (Chapter 13; car).

26. *In re Robbins,* 119 B.R. 1, 4 (Bankr. D. Mass. 1990) (Relief from stay in Chapter 11; apartment building).

27. *In re Johnson,* 117 B.R. 577, 581 (Bankr. D. Idaho 1990) (Chapter 13; car).

28. *In re Willis,* 115 B.R. 518, 520 (Bankr. D. S.C. 1989) (Chapter 13; car).

29. *In re Boyd,* 115 B.R. 516, 517-18 (Bankr. D. S.C. 1988) (Chapter 13; mobile home).

30. *Johnson v. General Motors Acceptance Corp.,* 115 B.R. 515, 516 (Bankr. D. S.C. 1988) (Chapter 13; car).

31. *In re Ridner,* 102 B.R. 247, 249 (Bankr. W.D. Okla. 1989) (Chapter 13; jewelry).

32. *In re Schaumberg Hotel Owner Ltd. Partnership,* 97 B.R. 943, 949-50 (Bankr. N.D. Ill. 1989) (Chapter 11; hotel).

33. *In re Smith,* 92 B.R. 287, 290-94 (Bankr. S.D. Ohio 1988) (Chapter 13; home).

34. *In re Boring,* 91 B.R. 791, 795 (Bankr. S.D. Ohio 1988) (Chapter 13; home).

35. *In re Richardson,* 82 B.R. 872, 873 (Bankr. S.D. Ohio 1987) (Chapter 7 lien stripping; home).

36. *In re Claeys,* 81 B.R. 985, 990-92 (Bankr. D. N.D. 1987) (Chapter 12; farm, machinery, livestock).

37. *In re Petry,* 76 B.R. 651, 653 (Bankr. C.D. Ill. 1987) (Chapter 13; home).

38. *In re King,* 75 B.R. 287, 290-91 (Bankr. S.D. Ohio 1987) (Redemption in Chapter 7; car).

39. *In re Reeder,* 60 B.R. 312, 315 (Bankr. D. Colo. 1986) (Exemption in Chapter 7; medical equipment).

40. *In re Cook,* 38 B.R. 870, 873-75 (Bankr. D. Utah 1984) (Chapter 13; car).

41. *In re Redding,* 34 B.R. 971, 972-73 (Bankr. M.D. Pa. 1983) (Redemption in Chapter 7; car).

42. *In re Parr,* 30 B.R. 276, 277-78 (Bankr. N.D. Ala. 1983) (Abandonment under Chapter 7; home).

43. *In re Paige*, 13 B.R. 713, 714-15 (Bankr. S.D. Ohio 1981) (Chapter 13; home).

44. *In re Ward*, 13 B.R. 710, 712 (Bankr. S.D. Ohio 1981) (Chapter 13; home).

45. *In re Neal*, 10 B.R. 535, 537 (Bankr. S.D. Ohio 1981) (Chapter 13; home).

46. *In re Van Nort*, 9 B.R. 218, 221 (Bankr. E.D. Mich. 1981) (Chapter 13; car).

47. *In re Thomas Parker Enterprises, Inc.*, 8 B.R. 207, 211 (Bankr. D. Conn. 1981) (Use of cash collateral in Chapter 11; cars in inventory).

48. *In re Damron*, 8 B.R. 323, 326 (Bankr. S.D. Ohio 1980) (Chapter 13; furniture).

49. *In re Cooper*, 7 B.R. 537, 539-40 (Bankr. N.D. Ga. 1980) (Chapter 13; car).

50. *In re McQuinn*, 6 B.R. 899, 900 (D. Neb. 1980) (Redemption in Chapter 7; mobilehome).

51. *In re Weaver*, 5 B.R. 522, 523 (Bankr. N.D. Ga. 1980) (Chapter 13; car).

52. *In re McLeod*, 5 B.R. 520, 521 (Bankr. N.D. Ga. 1980) (Chapter 13; car).

53. *In re Crockett*, 3 B.R. 365, 367 (Bankr. N.D. Ill. 1980) (Chapter 13; car).

54. *In re Adams*, 2 B.R. 313, 313-14 (Bankr. M.D. Fla. 1980) (Chapter 13; car).

Lower court decisions adopting other standards for valuing collateral a debtor proposes to retain and use:

55. *Barash v. Public Finance Corp.*, 658 F.2d 504, 511-12 (7th Cir. 1981) (Preference action under Chapter 7; cars; no standard chosen, remanded for consideration in light of competing interests and creditor's proposed use or disposition of collateral).

56. *In re Bergh*, ____ B.R. ____, 1992 WL 110241 at *23-26 (Bankr. D. Minn. 1992) (Chapter 11; commercial equipment and furnishings; going concern value).

57. *In re Stauffer*, No. 92-60322 (Bankr. N.D. Ohio May 26, 1992) (Chapter 13; car; average of retail and wholesale values).

58. *In re Otto's Tap, Inc.*, 90-1 U.S. Tax Cas. (CCH) ¶ 50,232 at 83,836, 1990 WL 63070 (Bankr. N.D. Ill. 1990) (Chapter 11; liquor inventory; value obtainable from use by debtor; somewhat less than retail or going concern value).

59. *In re Tenney Village Co.*, 104 B.R. 562, 564-67 (Bankr. D. N.H. 1989) (Motion to approve senior lien in Chapter 11; equipment; liquidation value).

60. *In re Thayer*, 98 B.R. 748, 750 (Bankr. W.D. Va. 1989) (Chapter 13; car; average of retail and wholesale values).

61. *In re Wendy's Food Systems, Inc.*, 82 B.R. 898, 900 (Bankr. S.D. Ohio 1988) (Chapter 11; restaurant; going concern, in-place value).

62. *In re Joe Flynn Rare Coins, Inc.*, 81 B.R. 1009, 1019-21 (Bankr. D. Kan. 1988) (Preference action in Chapter 11; coins; value received by creditor on resale).

63. *In re Fiberglass Industries, Inc.*, 74 B.R. 738, 741-42 (Bankr. N.D. N.Y. 1987) (Chapter 11; commercial real and personal property; going concern value).

64. *In re Farrell*, 71 B.R. 627, 628 (Bankr. S.D. Iowa 1987) (Chapter 13; car; average of retail and wholesale values).

65. *Bank Hapoalim B.M. v. E.L.L., Ltd.*, 42 B.R. 376, 379 (N.D. Ill. 1984) (Relief from stay in Chapter 11; inventory; net price received by debtor on sale of inventory).

66. *In re QPL Components, Inc.*, 20 B.R. 342, 344-46 (Bankr. E.D. N.Y. 1982) (Relief from stay in Chapter 11; inventory; net price received by debtor on sale of inventory).

67. *Sears, Roebuck & Co. v. Anderson,* 17 B.R. 521, 522-23 (Bankr. S.D. Ohio 1982) (Chapter 13; custom drapes; purchase price amortized over useful life).

68. *In re Klein,* 10 B.R. 657, 659-60 (Bankr. E.D. N.Y. 1981) (Chapter 13; car; amount the creditor would receive through its customary disposition of foreclosed collateral).

69. *In re Stumbo,* 7 B.R. 939, 940 (Bankr. D. Colo. 1981) (Chapter 13; car; value creditor would receive from dealer's repurchase agreement upon foreclosure).

70. *In re Willis,* 6 B.R. 555, 557 (Bankr. N.D. Ill. 1980) (Chapter 13; car; average trade-in value).

71. *In re Jones,* 5 B.R. 736, 738-40 (Bankr. E.D. Va. 1980) (Chapter 13; car; value between retail and wholesale value).

72. *In re Siegler,* 5 B.R. 12, 14 (Bankr. D. Minn. 1980) (Redemption in Chapter 7; car; middle value between retail and wholesale values).

73. *In re Miller,* 4 B.R. 392, 393-94 (Bankr. S.D. Cal. 1980) (Relief from stay in Chapter 13 case; car; median value between wholesale and retail values).

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No. 92-9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GENERAL MOTORS ACCEPTANCE CORPORATION,
Petitioner,

v.

GEORGE H. MITCHELL and CAROL J. MITCHELL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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United States Code, Title 11

Section 506. *Determination of secured status*

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

Section 1322. *Contents of plan*

. . .

(b) Subject to subsections (a) and (c) of this section, the plan may—

. . .

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims

Section 1325. *Confirmation of plan*

(a) Except as provided in subsection (b), the court shall confirm a plan if—

. . .

(5) with respect to each allowed secured claim provided for by the plan—

. . .

(B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim . . . .

REASONS FOR DENYING CERTIORARI

1. 11 U.S.C. § 506(a) does not authorize the adoption of a uniform nationwide approach to valuing all secured claims, as proposed by GMAC.

GMAC, in its Petition for Writ, p. 5, states correctly that "collateral must be valued for many different purposes in bankruptcy, including confirmation and implementation of reorganization plans, motions for relief from stay, applications for use of cash collateral, and redemption." All of these are among the many possible "purposes of the valuation" referred to in 11 U.S.C. § 506(a).

For each "purpose" of a valuation, a court may find a different method of valuation appropriate for the circumstances involved. A method of valuation for one purpose may not be appropriate in another context.

The legislative history reaffirms the meaning of § 506(a) in this regard.

> Additionally a determination of what portion of an allowed claim is secured . . . is binding only for the purpose for which the determination is made. Thus determinations for purposes of adequate protection is not binding for purposes of "cram down" . . .
> (124 Cong. Rec. H 11095, H 11111, H 11112 (Sept. 28, 1978).

> While courts will have to determine value on a case-by-case basis, the subsection makes it clear that valuation is to be determined in light of the purpose of the valuation and the proposed disposition or use of the subject property . . . To illustrate, a valuation early in the case in a proceeding under sections 361-363 would not be binding upon the debtor or creditor at the time of confirmation of the plan.
> (S. Rept. No. 95-989 to accompany S. 2266, 95th Cong., 2d Sess. (1978) p. 68.).

GMAC does not recognize the complex nature of the process by which secured claims are valued under the Bankruptcy Code. GMAC strongly implies that the Ninth Circuit's decision in this case applies across-the-board to all situations involving the valuation of secured claims. (Petition for Writ, pp. 5-9). GMAC urges this Court to adopt "a uniform, national approach to valuing collateral in bankruptcy" (Petition for Writ, p. 9). No such "uniform" approach is possible, in light of the wording of the statute and its legislative history.

The Ninth Circuit's decision in this case applies only to the valuation of secured claims for the purpose of confirmation of a Chapter 13 plan pursuant to 11 U.S.C. § 1325(a)(5)(B)(ii). It does not apply to valuations for other purposes in Chapter 13 cases, such as a § 109(e) evaluation, or a § 363 motion for sale, use or lease of property. And,

there is no justification for asserting that the Ninth Circuit's decision applies to cases under other chapters.

2. **There is no conflict between the Ninth Circuit's decision in this case and decisions of other Circuits and this Court's decisions.**

GMAC cites numerous cases which are claimed to be in conflict with the Ninth Circuit's decision in this case. It is important to note that a large percentage of reported bankruptcy cases are *non*-Article III trial court decisions — below even the level of U.S. District Courts.

Most of these cases do not, in fact, conflict with the Ninth Circuit's decision. Most of the cases can be differentiated by the purpose of the valuation or type of bankruptcy relief involved (eg. Chapters 7, 11, 12, 13).

a. **The Ninth Circuit's decision in this case does not conflict with the Fourth Circuit's decision *In re Balbus*, 993 F.2d 246 (4th Cir. 1991).**

GMAC asserts that the Ninth Circuit's decision in this case conflicts with the Fourth Circuit's decision in *In re Balbus*. Since this is the only other circuit court of appeals to even remotely touch on the same issue, GMAC stretches to find a conflict.

Such a conflict simply does not exist. *In re Balbus* was a Chapter 13 case in which the issue of the valuation of secured claims arose under a determination of the debtor's eligibility as a Chapter 13 debtor pursuant to 11 U.S.C. § 109(e). The secured creditor argued that the debtor had more than the $100,000 jurisdictional limit of unsecured debt for Chapter 13 cases. The secured creditor arrived at this calculation by arguing that costs of sale should be deducted from the value of the securing assets, in order to shift more of the total debt into the unsecured category and disqualify the debtor for Chapter 13 protection.

The Fourth Circuit rejected the creditor's attempt to disqualify the Chapter 13 debtor and addressed § 506(a) in that context. By no means is the purpose of a § 109(e) evaluation at all similar to the purpose of determining compliance with § 1325(a)(5)(B)(ii) in confirming a Chapter 13 plan. In *In re Balbus*, no decision was made as to the amount that would be paid the holder of the secured claim through the plan.

Different methods of valuing secured claims in § 109(e) evaluations and § 1325(a)(5)(B)(ii) can comfortably co-exist not only between different circuits—but even within the same circuit.

b. The Ninth Circuit's decision in this case does not conflict with this Court's decision in *Dewsnup v. Timm*, ____ U.S. ____, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992).

Dewsnup has little or no applicability to the Mitchells' case. The *Dewsnup* case was a Chapter 7, while the Mitchells filed a Chapter 13. In Chapter 13 cases, 11 U.S.C. § 1325(a)(5)(B)(ii) and § 1322(b)(2) govern the treatment of fully or partially secured claims, such as GMAC's. The sections are clear, and the legislative history surrounding § 1325(a)(5)(B)(ii) is completely different from § 506(d). Section 1325(a)(5)(B)(ii) invokes § 506(a) in valuing secured claims, but does not refer to or rely upon § 506(d) regarding the voiding of liens.

Apparently, in large part due to the confusing scenarios offered by the parties, this Court was unwilling to apply its result in *Dewsnup* beyond the facts presented:

> Hypothetical applications that come to mind and those advanced at oral argument illustrate the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations. We therefore focus upon the case before us and allow other facts to await their legal resolution on another day.
> *Dewsnup v. Timm*, at 778.

GMAC asserts that this Court, in *Dewsnup v. Timm*, ruled that "a secured creditor's interest extends beyond the right of immediate foreclosure, to encompass, at a minimum, the right to recover future appreciation of the collateral as well." (Petition for Writ, p. 17). GMAC argues that the Ninth Circuit's decision in this case conflicts with this purported rule of *Dewsnup*.

The Mitchells believe that the reference to the mortgagee's claim to appreciation was not intended by this Court to be interpreted as a "Rule" to be applied to all chapters of the Bankruptcy Code and to all fact situations. The Mitchells believe that this reference in *Dewsnup* has been taken completely out of context by GMAC and is not relevant to this case currently before this Court.

In addition, the security in question is an automobile — and most automobiles (including the Mitchells') do not appreciate. Therefore, GMAC's assertion that the Ninth Circuit's decision would necessarily deprive lienholders of appreciation is without merit.

GMAC states (Petition for Writ, p. 17):

> Under the Ninth Circuit's interpretation, a day after confirmation of a cram-down plan, a debtor could pay its creditor the wholesale value of its collateral, then sell the collateral at its retail value and pocket the difference — about $3,500 in this case.

This assertion is demonstrably false. First, the debtors would never be able to sell the vehicle for "retail" value, as that term was used by the Ninth Circuit and the Bankruptcy Appellate Panel. "Retail" value in this context, includes the overhead and profit of a used car dealer. A private party would not normally be able to achieve such a high price because an individual would not have the assistance of a trained used car salesman and the advertising budget of a dealer. Therefore, an individual would obtain a lower than "retail" sales price.

Second and even more important is GMAC's failure to

take into consideration the provisions of 11 U.S.C. § 363. The Chapter 13 debtor would move for permission to sell the vehicle pursuant to § 363. The formerly-secured creditor would be noticed along with other creditors and would be able to object to the distribution of sale proceeds to the debtor, and potentially re-value its secured claim. 11 U.S.C. § 506(a) clearly envisions valuations in the context of § 363 motions, and provides for these valuations to differ from valuations in other contexts. GMAC does not recognize this flexibility Congress built into § 506(a).

c. The Ninth Circuit's decision in this case is consistent with this Court's decision in *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).

In *Timbers of Inwood*, this Court found that an undersecured creditor such as GMAC does *not* have the right of immediate foreclosure or repossession for which it must be *additionally* compensated if the debtor retains the secured asset. This Court found that the secured creditor is entitled to adequate protection (which may be in the form of periodic payments on the principal or insurance, etc.), but that additional compensation for being prevented from foreclosing on the asset, the "use value," is *not permissible*.

In essence, that is what GMAC is demanding in this case. GMAC is saying that the debtors should pay and the creditor is entitled to receive money in addition to what GMAC would receive if it repossessed the vehicle, simply because the debtors are retaining the vehicle. GMAC describes it slightly differently, but that is what GMAC is requesting: *additional* compensation for being prevented from repossessing the vehicle.

GMAC creates the appearance of a conflict with this Court's decision in *Timbers of Inwood*, only by citing passages completely out of context. There is no conflict between the

Ninth Circuit's decision in this case and the decision of this Court in *Timbers of Inwood*.

d. **Many cases cited by GMAC as being in conflict with the Ninth Circuit's decision involve disparate fact situations which distinguish the results from those in this case.**

To analyze each of the 70 lower court decisions listed by GMAC in its Appendix would unnecessarily burden the reader as well as the writer. The vast range of actual issues addressed, types of secured property, purposes for the valuation, and chapters of the Bankruptcy Code, create a mosaic of case law — most of which is surprisingly *not* inconsistent.

An example of a case improperly cited by GMAC as conflicting with the Ninth Circuit's decision in this case is *In re Courtright*, 57 B.R. 495 (D.Ore. 1986). This decision is difficult to analyze primarily because it does not disclose what chapter of the Bankruptcy Code the debtors filed under, nor does the court state the purpose of the valuation. Therefore, the results of this decision are of limited value since without knowing the context of the case, it can only be cited out of context.

GMAC claims that "uncertainty" regarding secured claim valuation methods is costing the "financially strapped debtor and its creditors" (Petition for Writ, p. 6) unnecessary attorneys fees. The Mitchells disagree with this claim. The Mitchells argue that there is relatively little "uncertainty" about the valuation process, as evidenced by the fact that this is the first case to be decided by a Circuit Court. The Mitchells note, however, that GMAC has stirred up a great deal of litigation across the country in an attempt to *develop* case law which would benefit GMAC's financial portfolio.

In many cases, "financially strapped debtors" cannot afford to appeal (or defend appeals). The Mitchells can be counted among these debtors. GMAC's expression of sympathy for the financial plight of debtors in support of its request for "certainty" is disingenuous.

3. The "Question Presented" by GMAC to this Court cannot be answered because it is predicated upon an erroneous assumption.

The Question Presented by GMAC assumes that only one universal standard for valuing secured claims must exist. The Question Presented asks this Court to decide which of two standards shall apply to all bankruptcy cases. GMAC demands that this Court choose between the standard used in *In re Balbus* [apples] or the standard used by the Ninth Circuit in this case [oranges]. The assumption that one standard fits all is clearly erroneous in light of the plain wording of the statute and its legislative history. Phrased as it is, the Question Presented can only be answered by saying that neither standard is the universal rule.

GMAC's characterization of the valuation method in *In re Balbus* as "retail" is misleading. "Retail value" is not adopted in *Balbus*, in part because the secured item in *Balbus* is a house. The distinction GMAC emphasizes between retail and wholesale values does not apply to the real estate market. There is no retail-wholesale distinction for used houses in the same sense that there is a retail-wholesale distinction in the market for used cars. Houses are generally sold by private parties who do not have the additional mark-up for profit and overhead that exists when a "retailer" sets prices.

The car industry routinely uses published guides to vehicle values. These guides (eg. Kelley Blue Book) show two values for each car: retail value is the price a dealer would charge an ultimate consumer, and the wholesale value is the price a dealer would pay to obtain the car for resale. By redefining the commonly used term "retail" (Petition for Writ, p. 13, fn. 16) GMAC hopes to equate the valuation method used in *Balbus* with the more commonly used "retail" value which is what a GM car dealer receives, including mark-up for profit and

overhead.

The confusion that would result from the adoption of GMAC's proposed definitions of "retail" and "wholesale" values can be further illustrated. As uniquely defined by GMAC in its Petition for Writ, GMAC's sale of a repossessed vehicle would be simultaneously both "retail" and "wholesale." GMAC disposes of repossessed vehicles by third-party commercial auction to used car dealers. Such a sale is considered "commercially reasonable" under applicable state laws. According to GMAC's definition, this commercially reasonable price is a "retail" value. Yet by its definition, GMAC's sale of repossessed vehicles is also a "wholesale" value because the buyer is a retail dealer.

GMAC is actually proposing that "retail blue book" value is "retail value." GMAC is actually promoting the adoption of a valuation method that would include dealer profit and overhead and which is quite different from the value received in a commercially reasonable disposition of a repossessed vehicle. Yet this method of valuing secured claims is embraced by neither *Balbus* nor the Ninth Circuit's decision in this case.

GMAC is asking this Court to choose either the valuation method used in *Balbus* or that used by the Ninth Circuit; but it is actually proposing a third method which was approved by neither Circuit. If this Court were to adopt the *Balbus* standard, GMAC's confused definitions may inadvertently create the appearance that the "retail blue book" valuation is the same as the *Balbus* standard.

4. **The Ninth Circuit's decision in this case was correct and in accord with the vast majority of reported lower court decisions.**

The Ninth Circuit's decision in this case was correct. It properly considered the broad range of possible "purposes" of valuation such as § 362 Motions for Relief, § 363 Motions for Use, Sale or Lease of Property, and § 1325(a)(5)(B)(ii) Chapter 13 plan confirmations (which was the purpose of the valuation in the Mitchells' case). The Ninth Circuit limited its decision to

the context presented before it, Chapter 13 plan confirmation pursuant to 11 U.S.C. § 1325 (a)(5)(B)(ii).

Furthermore, the Ninth Circuit did indeed consider the "use" of the secured item proposed in the plan and found that the use was a normally expected use of a private automobile which would neither augment nor detract from its intrinsic value.

The Ninth Circuit's decision is also consistent with "the vast majority of reported bankruptcy court decisions" (954 F.2d at 560, Petition for Writ, App. A, p. A-4).

5. The Ninth Circuit's decision in this case was fair.

The Ninth Circuit's decision was fair to both the creditor and the debtors.

By the terms of the decision and the Chapter 13 plan, the creditor retained its lien on the secured claim and became entitled to the full dollar amount it would have received had it repossessed and disposed of the vehicle in a commercially reasonable manner. GMAC became entitled to receive monthly disbursements in an amount necessary to adequately protect its secured claim. And in addition, GMAC would receive *additional compensation* above and beyond the dollar amount of the secured claim — in compensation for receiving payments through the plan instead of a cash lump-sum payment.

Likewise, the Ninth Circuit's decision was fair to the debtors. The debtors had purchased the vehicle more than a year before filing the Chapter 13. The debtors paid $5,000 down and financed the remaining balance. The debtors made the car payments for about one year before encountering financial reversals, whereupon they filed the Chapter 13. While the debtors had no financial *equity* in the vehicle, they certainly had an *equitable interest* in the vehicle due to their considerable monetary investment in it and their reliance on it for transportation. Therefore, it was fair to the debtors to allow them to pay the secured claim and retain the vehicle.

6. The Ninth Circuit's decision in this case lacks the degree of importance required to justify a review by this Court.

Using GMAC's estimate of 225,000 Chapter 13 cases filed last year, it is reasonable to assume that approximately two million Chapter 13 cases have been filed under the Bankruptcy Code. Let us also use GMAC's estimate that fifty percent of these cases involve car loans. If the question is as important as GMAC asserts, it is difficult to understand why the Mitchells' case is the first to reach the circuit court level, considering the million other similar cases in existence since 1979.

The fact that no other circuit has addressed this issue is indicative of the very low level of controversy surrounded this issue. In the extreme position taken by GMAC in this case, it appears that GMAC is manufacturing what it purports to be an important question.

a. Most bankruptcy appeals involve the incremental loss of money by the creditor or debtor, which apply to potentially thousands of cases each year. However, this fact does not require this Court to review each bankruptcy decision for which a writ of certiorari is petitioned.

The purpose of the Bankruptcy Code is to establish a fair and orderly way to discharge certain debts. Accordingly, most petitions for certiorari regarding the Bankruptcy Code involve the incremental loss of money by either the creditor or the debtor. And, in most bankruptcy cases, the monetary loss of the party may apply to thousands of other similar cases each year. However, the fact that many similar cases may exist does not require this Court to accept each bankruptcy case for which a writ of certiorari is petitioned.

b. The dollar amount GMAC asserts that it and other creditors will lose must be measured against their gross income to determine the degree of effect of the Ninth Circuit's decision.

GMAC is the financing arm of General Motors Corporation. As such, it is one of the largest financial institutions in the nation. The Mitchells are unaware of the gross income of GMAC, but the gross sales of GM Corporation in 1990 was $126,000,000,000 (One Hundred Twenty-six Billion Dollars) (*The World Almanac and Book of Facts 1992*, Pharos Books, p. 147).

As a result of the Ninth Circuit's decision in this case, GMAC will lose an additional increment of money in Chapter 13 cases. However, the impact of that increment will probably be fairly insignificant in light of its gross income.

CONCLUSION

For these reasons, the Court should deny GMAC's petition for a writ of certiorari.

Dated: July 22, 1992

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1992

GENERAL MOTORS ACCEPTANCE CORPORATION,

Petitioner,

vs.

GEORGE H. MITCHELL AND CAROL J. MITCHELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN FINANCIAL SERVICES ASSOCIATION AND CONSUMER BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF AMERICAN FINANCIAL SERVICES ASSOCIATION AND CONSUMER BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

The American Financial Services Association and the Consumer Bankers Association respectfully move for leave to file the attached brief as amici curiae in support of the Petition. Counsel for petitioner has given his consent to the filing of this brief. The consent of counsel for the Mitchell respondents was requested but refused.

The American Financial Services Association ("AFSA") is the nation's largest trade association representing non-bank providers of consumer financial services. Organized in 1916, AFSA represents 367 companies operating 10,910 offices engaged in extending $190 billion of consumer credit throughout the United States. These companies range from independently-owned consumer finance offices to the nation's largest financial services, retail and automobile companies.

Retail and automobile credit is extended through thousands of stores and dealers. Consumer finance companies hold over $190 billion of consumer credit outstanding and over $50 billion in second mortgage credit representing one quarter of all consumer credit outstanding in the United States.

The Consumer Bankers Association ("CBA") was founded in 1919 to provide a progressive voice for the retail banking industry. CBA represents approximately 700 federally insured banks, savings and loans and credit

unions that, in aggregate, hold more than 80% of all consumer deposits and more than 70% of all consumer credit held by federally insured depository institutions.

As explained in the Interest of Amici Curiae section of the attached brief, amici and their members have a vital interest in the outcome of the issue presented by the petition. Members of amici are involved as secured creditors in thousands of Chapter 13 proceedings each year. Many of those proceedings involve the valuation issue raised in the petition. Certainty about the appropriate standard for valuation of collateral retained by the debtor under a Chapter 13 plan is sorely needed by the bankruptcy courts, debtors and creditors alike.

Amici believe that their participation may help ensure that the Court is presented with a full exposition of the issue presented in the petition in the context of Congress' intent to require debtors to share with their creditors the enhanced value attributable to reorganization. Congress made this choice cognizant of the added risks secured creditors encounter in Chapter 13 proceedings and the costs to other consumers of overly generous benefits to debtors in bankruptcy. Amici will also show the deleterious effect that denial of the writ would have on the bankruptcy courts, debtors and creditors and on

the orderly, efficient provision of consumer financial services.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The American Financial Services Association ("AFSA") is the nation's largest trade association representing non-bank providers of consumer financial services. Organized in 1916, AFSA represents 367 companies operating 10,910 offices engaged in extending $190 billion of consumer credit throughout the United States. These companies range from independently-owned consumer finance offices to the nation's largest financial services, retail and automobile companies.

Retail and automobile credit is extended through thousands of stores and dealers. Consumer finance companies hold over $190 billion of consumer credit outstanding and over $50 billion in second mortgage credit representing one quarter of all consumer credit outstanding in the United States.

The petitioner and other major automobile sales finance companies are members of AFSA. In thousands of bankruptcy proceedings each year, each of these companies faces the question presented by the petition: How is the automobile to be valued when the debtor proposes to retain and pay for it through his or her Chapter 13 plan?

A decision by this Court adopting a uniform, nationwide standard of valuation would greatly benefit these consumer lenders, allowing them to predict their potential bankruptcy losses and settle, rather than litigate, valuation questions with debtors.

Other AFSA members would also benefit from this Court's granting certiorari in this case. The standard of

valuation under 11 U.S.C. § 506(a) affects all collateral, not just cars. Homes and other real property must also be valued to determine how much of a creditor's claim is secured. The courts are in just as great disagreement about how to value real property as they are on how to value automobiles.

Some courts routinely deduct 10% of the value of real property collateral as hypothetical selling costs. *E.g., In re Overholt*, 125 B.R. 202, 215 (S.D. Ohio 1990). A "growing number of courts have rejected this line of reasoning, and have refused to deduct the sale costs in rendering a § 506 calculation unless the debtor's plan contemplates selling the property on the open market." *In re 222 Liberty Assoc.*, 105 B.R. 798, 803 (Bankr. E.D. Pa. 1989), quoted and followed in *In re Balbus*, 933 F.2d 246, 249-50 (4th Cir. 1991).

This issue is of vital concern to the many AFSA members that are second mortgage lenders. As the recent decision in *In re Weber*, ___ B.R. ___, 1992 WL 120156 (S.D. Ohio 1992) illustrates, deduction of hypothetical sales costs drastically reduces the amount paid second mortgage lenders in Chapter 13 plans, particularly when the economy and the real estate market are sagging. *See* Polk, *The Chapter 13 Cramdown: New Nightmare for the Lender*, 19 Real Estate L. J. 279, 279-80 (1991).

The Consumer Bankers Association ("CBA") was founded in 1919 to provide a progressive voice for the retail banking industry. CBA represents approximately 700 federally insured banks, savings and loans and credit unions that, in aggregate, hold more than 80% of all

consumer deposits and more than 70% of all consumer credit held by federally insured depository institutions.

CBA's member institutions make consumer loans secured by homes, cars and other personal or real property. Like AFSA members, CBA member institutions are vitally concerned that a proper, uniform standard be adopted for valuation of collateral in bankruptcy.

Valuing collateral is a fundamental task of the bankruptcy courts which affects numerous decisions, rights and remedies under various sections of the Bankruptcy Code. With the currently rising tide of consumer bankruptcies in the United States, many of AFSA's and CBA's members are confronted, as never before, with the need for certainty and predictability as to their rights as creditors in bankruptcy. A decision by this Court on the core issue of valuation of collateral would be a major step toward meeting this need.

SUMMARY OF ARGUMENT

1. The Court should grant certiorari to bring certainty and predictability to this fundamental area of bankruptcy practice. As the petition shows, the lower courts are in considerable disarray on how to value collateral retained by a debtor. Among the dozens of lower court decisions on the issue, opinions can be found to support virtually any point of view.

Only lawyers find comfort in being able to cite authority on every side of an issue. For clients – be they debtors or creditors – the current state of the law on this

issue is a disaster. The multiplicity of conflicting decisions encourages litigation and discourages settlement, as the large number of conflicting decisions itself proves.

Consumer credit is a high-volume, low balance business which requires legal certainty to operate efficiently. Unclear or uncertain legal standards breed transactions costs – litigation expense – that quickly overwhelms the comparatively small amounts at stake in any given case, about $3,000 in this case, for example. Debtors, too, can ill afford such litigation.

The lower courts, debtors and creditors alike need the certainty and uniformity which only this Court can bring by granting review and deciding the issue raised by the petition.

2. The decision below not only creates an inter-Circuit conflict, thus exacerbating the disarray of lower court opinions on the issue raised by the petition, but it also reaches the wrong result, ignoring Congress' stated intent to allow creditors to share in the enhanced value generated by a debtor's proceeding under Chapter 13 rather than under Chapter 7.

In enacting the Bankruptcy Reform Act of 1978 and the Bankruptcy Amendments and Judgeship Act of 1984, Congress encouraged consumer debtors to proceed under Chapter 13 rather than to liquidate under Chapter 7. Congress did so because reorganization enhances value.

Part of the bargain Congress struck in Chapter 13 was that the debtor share some of this enhanced value with his or her creditors. The Chapter 13 plan must treat holders of unsecured claims at least as well as they would

be treated in a straight liquidation under Chapter 7. Holders of secured claims must be given even better treatment. They are entitled to share in the enhanced value of the reorganization to the extent the debtor's proposed use or disposition of the collateral gives it greater value than it would have on foreclosure or liquidation.

Read in light of this underlying policy, the subdivisions of 11 U.S.C. § 1325 are consistent with each other and form a harmonious whole with the two sentences of 11 U.S.C. § 506(a). The opinion below ignores Congress' intent and improperly reads § 506(a) as denying secured creditors any part of the enhanced value of reorganization.

3. Granting secured creditors a portion of the enhanced value due to reorganization compensates them in part for the increased risks they incur in reorganization.

To be confirmed, a Chapter 13 plan must promise to the holder of a secured claim payment of an amount equal to the present value of that claim. 11 U.S.C. § 1325(a)(5)(B)(ii). But a promise to pay equivalent value is not worth as much as cash in hand, which the creditor would receive on foreclosure or liquidation. Promises are cheap because they are often not fulfilled. At least a third of Chapter 13 plans are never completed, and those cases are dismissed or converted to a Chapter 7 liquidation.

The collateral's value will have declined meanwhile, most often at an accelerated pace because the debtor is unable to pay for necessary maintenance. This is particularly true of cars and other similar collateral which

require regular, costly maintenance. As a result, on dismissal or conversion of an unsuccessful Chapter 13 plan, the creditor loses still more.

Congress determined that debtors should compensate secured creditors for these increased risks and required debtors to share with secured creditors part of the reorganization-enhanced value of their collateral. The decision below improperly fails to recognize this fact.

4. Interpreting 11 U.S.C. §§ 506(a) and 1325(a)(5), as the Ninth Circuit did, to allow debtors to retain collateral while paying secured creditors only its foreclosure value gives debtors an unwarranted bounty. That largess does not come free.

Read as the Ninth Circuit did, the Bankruptcy Code works as Robin Hood in reverse, robbing often poorer consumers to pay for the profligacy of the few through higher prices, higher credit charges or decreased availability of credit.

The Ninth Circuit misread the Bankruptcy Code, mistook Congress' intent, and misunderstood social policy. Its decision in this case conflicts with the reasoning and result in *In re Balbus, supra,* 933 F.2d 246. The debate over the proper standard of valuation of property retained by a debtor – which has been raging in the bankruptcy and district courts for more than a decade – has now reached the level of an inter-Circuit conflict.

It is time for this Court to step in, grant certiorari, and bring order out of this existing chaos.

ARGUMENT

1. Certiorari Should Be Granted To Resolve The Inter-Circuit Conflict And Make The Valuation Of Collateral In Bankruptcy Predictable.

The Court should grant the petition in this case to resolve the conflict between the Ninth Circuit's decision in this case and the Fourth Circuit's decision in *In re Balbus, supra,* 933 F.2d 246. The clash between these two decisions is symptomatic of the on-going and much more extensive controversy among the district and bankruptcy courts concerning the proper standard for valuing collateral retained by a debtor in bankruptcy. *See* Petition for Certiorari, App. E.

Petitioner has catalogued 73 lower court decisions on this issue. More will continue to appear until this Court resolves the issue. *See, e.g., In re Dixon,* ___ B.R. ___, 1992 WL 103624 (W.D. N.Y. 1992).

Now is the time for the Court to grant certiorari and end this splintering of authority. Continuing dissension among lower courts on this issue harms all participants in bankruptcy.

Valuation of collateral is a crucial task that bankruptcy courts must perform daily. In many different contexts, and under many different sections of the Bankruptcy Code, rights hinge on how much the collateral is worth. Carlson, *Secured Creditors and the Eely Character of Bankruptcy Valuations,* 41 Am. U. L. Rev. 63, 66-70 (1991).

Uncertainty about how to perform such a fundamental task spawns litigation wasting the courts' time and the

parties' money. The uncertainty forces courts to consider time and again the same valuation question, as the 73 published lower court decisions, collected in Appendix E to the Petition demonstrate. The bankruptcy courts can ill afford this unnecessary task, burdened as they now are by a rapidly rising tide of bankruptcy filings.[1]

The continuing conflict on this question is at least as harmful to debtors and creditors. Because the parties do not know by what standard the court will value collateral, they find it harder to settle valuation disputes. Litigating the valuation issue causes legal expense that financially strapped debtors cannot pay.

Creditors suffer, too, when forced to fight the same issue repeatedly. They also incur litigation expense that substantially reduces the net return on money lent the debtor. While the amounts at stake in any single bankruptcy are small, the cumulative losses from the many thousands of bankruptcy cases are substantial.

Because consumer credit involves a large volume of comparatively small loans, it is a business particularly susceptible to harm from the increased costs associated with this sort of legal uncertainty.

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[1] According to the Administrative Office of the United States Courts, bankruptcy filings during the 12 months ending March 31, 1992 exceeded the previous year's filings by 16.4% nationally. Bankruptcy filings in the First Circuit were up by 25.5%, in the Second Circuit up by 33.4%, in the Third Circuit up by 28.2%, in the Fourth Circuit up by 23.3%, and in the Ninth Circuit up by 21%. Bankruptcy Statistical Information, prepared by the Administrative Office of the United States Courts.

Only a decision by this Court can bring the needed certainty and predictability to this important area of bankruptcy law. Further decisions by the lower courts will only add to the cacophony of the dozens of decisions already addressing the issue.

The Court should take this opportunity to grant certiorari and establish a clear, nationwide rule on the standard of valuation of collateral retained by the debtor.

2. Congress Intended Creditors To Share In The Enhanced Value Arising From Reorganization; Sections 506(a) And 1325(a)(5)(B) Must Be Interpreted To Accomplish That End.

The Ninth Circuit's decision in this case not only exacerbates the disarray of lower court opinions on the valuation question, but it also misinterprets 11 U.S.C. §§ 506(a) and 1325(a)(5)(B)(ii), ignoring Congress' stated intent to allow creditors to share in the enhanced value generated by a debtor's proceeding under Chapter 13 rather than under Chapter 7.

In enacting the Bankruptcy Reform Act of 1978 and the Bankruptcy Amendments and Judgeship Act of 1984, Congress intended to encourage consumer debtors to proceed under Chapter 13 rather than under Chapter 7. *See* H.R. Rep. 595, 95th Cong., 1st Sess. 118, 125 (1977) *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6079, 6086; 130 Cong. Rec. H7499 (daily ed. June 29, 1984) (remarks of Rep. Anderson); 130 Cong. Rec. S8894 (daily ed. June 29, 1984) (remarks of Sen. Hatch), *reprinted in* 1984 U.S. Code, Cong. & Admin. News 590, 598.

As Congress recognized, proceeding under Chapter 13, rather than Chapter 7, should benefit both debtors and creditors. Chapter 13 proceedings help debtors avoid the stigma of bankruptcy and any resulting blot on their credit standing. Fulfillment of a Chapter 13 plan allows the debtor "to retain the pride attendant on being able to meet one's obligations." H.R. Rep. 595, *supra*, at 118; 1978 U.S. Code, Cong. & Admin. News at 6079.

Most importantly, Chapter 13 benefits the debtor by allowing the debtor to retain his or her assets. *Ibid*. Retention of assets is a benefit because a debtor's personal property and home are normally worth more to the debtor and cost more to replace than the price at which they can be sold. H.R. Rep. 595, *supra*, at 124; 1978 U.S. Code, Cong. & Admin. News at 6085.

Chapter 13 was also intended to aid creditors: "The benefit to creditors is self-evident: Their losses will be significantly less than if their debtors opt for straight bankruptcy." H.R. Rep. 595, *supra*, at 118; 1978 U.S. Code, Cong. & Admin. News at 6079.

Congress' intent that debtors and creditors both share in the increased value of a reorganization under Chapter 13 is evident not only in the legislative history, but in the statutory text, as well. Section 1325(a)(4) requires Chapter 13 plans to provide holders of unsecured claims "not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title. . . ." As the House Report states, Chapter 13 allows debtors to propose realistic payment plans, but "[c]reditors will not be

disadvantaged, because the plan must still pay them more than they would get under a liquidation." H.R. Rep. 595, *supra*, at 124; 1978 U.S. Code, Cong. & Admin. News at 6085.

Holders of secured claims must receive even better treatment under Chapter 13 plans. Unless a secured creditor accepts the plan or the debtor surrenders the collateral, the plan must give the secured creditor a continuing lien in the collateral and provide for payment of an amount "not less than the allowed amount of such claim." 11 U.S.C. § 1325(a)(5)(B)(ii).

The allowed amount of the secured claim is determined under section 506(a), which directs that the value of the creditor's interest in the estate's interest in the collateral be determined in light of the purpose of the valuation and the proposed use or disposition of the property. The proposed use or disposition of the collateral under a Chapter 13 plan typically is retention by the debtor, a use which Congress recognized enhanced the value of the collateral – hence, benefited the debtor. By taking that value enhancement into account in setting the allowed amount of secured claims for purposes of Chapter 13 plans, Congress achieved the sharing of benefits from reorganization which it intended to establish.

This interpretation of sections 506(a) and 1325(a)(5) not only harmonizes their provisions but achieves the goals Congress intended to achieve when it enacted Chapter 13.

By contrast, the Ninth Circuit's reading of section 506(a) not only sets its two sentences in conflict, *see In re Claeys*, 81 B.R. 985, 990-91 (Bankr. D. N.D. 1987), but

renders section 1325(a)(5) largely superfluous[2] and contravenes Congress' stated intent.

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[2] Under the Ninth Circuit's reading, the allowed amount of a secured claim would rarely, if ever, exceed foreclosure value. *See* 954 F.2d 557, 560. Foreclosure value is what a secured creditor receives in a Chapter 7 liquidation, either through the estate's surrender of the collateral for sale by the creditor or through sale by the trustee. *See* 11 U.S.C. §§ 362, 363, 554, 725. Had Congress meant for secured creditors to be guaranteed only this minimal value in Chapter 13 plans, it would not have treated them separately under section 1325(a)(5), but would have simply combined both secured and unsecured claims under section 1325(a)(4), which guarantees payment of an amount not less than would be paid on the claim under a straight liquidation.

In re Dixon, supra, 1992 WL 103624 illustrates this point. In *Dixon,* an *unsecured* creditor objected to a Chapter 13 plan on the ground that it failed to pass muster under section 1325(a)(4). The creditor claimed that unsecured creditors would receive more from liquidation than under the Chapter 13 plan because the debtor's home could then be sold to pay unsecured creditors' claims. The creditor argued that hypothetical selling costs should not be subtracted from the home's value in computing the home's value for purposes of making this comparison.

Rejecting this contention, the court distinguished authorities which looked "only to market price, without deduction for costs of sale, when dealing with many of the provisions of the Bankruptcy Code which, like § 522(f), require the Court to determine the 'value' of the property. Here it is agreed that the value of the debtor's home is $100,000. The dispute does not involve the 'value' of anything. What is at issue is the amount that creditors would ultimately receive if this home were sold for $100,000 in a Chapter 7 case concerning this debtor." *Id.,* at *1. Finding that selling costs would inevitably be incurred in a sale of the home under Chapter 7, the Court concluded that deduction of hypothetical costs of sale was appropriate under the "not

The Court should grant the petition to vindicate Congress' stated intent as to the treatment of secured claims in Chapter 13 proceedings.

3. Sections 506(a) And 1325(a)(5)(B) Were Intended And Should Be Interpreted To Compensate Holders Of Secured Claims For The Added Risks They Incur Under Chapter 13.

Congress had good reason to require debtors to share with secured creditors the reorganization enhancement in the value of collateral. Chapter 13 proceedings pose added risks to secured creditors for which they should be compensated.

Under section 1325(a)(5)(B)(ii), the Chapter 13 plan must provide that *over the course of the plan* the secured creditor will receive property with a present value equal to the value of the collateral. Most Chapter 13 plans comply with this subdivision by providing that the

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less than would be received under Chapter 7 liquidation" test of section 1325(a)(4).

Under the Ninth Circuit's construction of section 506(a), the exact same result would obtain under section 1325(a)(5)(B)(ii) even though that section guarantees secured creditors the "value" of their collateral, not merely as much as they would receive under a Chapter 7 liquidation. *See, e.g., In re Weber, supra,* ___ B.R. ___, 1992 WL 120156 at *2-4. Under this reading subdivisions (a)(4) and (a)(5) achieve the same results despite their different wording and separate treatment of secured and unsecured creditors – a result Congress did not intend, else it would have written a single subdivision dealing with secured and unsecured alike.

debtor will make monthly payments to the secured creditor over the course of the plan, commonly 3-5 years.

The Chapter 13 plan is debtor's promise to pay overtime. Like any promise, it is worth less than cash in hand. This is particularly true of a Chapter 13 debtor's promise of future payment. The debtor already defaulted once on his promises. Moreover, the track record for Chapter 13 debtors in general is less than sterling. About a third of all such debtors fail to complete their plans, resulting in dismissal of their Chapter 13 cases or conversion into Chapter 7 liquidation. Girth, *The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals*, 65 Ind. L. Rev. 17, 39-41 (1989).

The debtor's promise to pay the value of the collateral over the course of the plan, thus, is inherently of less value than what a secured creditor would receive through straight liquidation – either the property or its value immediately.

Deterioration or depreciation of the collateral while the debtor is in Chapter 13 poses an additional, serious risk for secured creditors. As already noted, about a third of all Chapter 13 proceedings are unsuccessful. The debtor does not propose or does not complete a plan, and the case is dismissed or converted to a Chapter 7 liquidation. Girth, *supra*, 65 Ind. L. Rev. at 39-41. Upon dismissal or conversion, the secured creditor must resort to its collateral for payment of the remaining debt.

Secured creditors commonly find that the property has deteriorated or depreciated during the course of the Chapter 13 far beyond the amount of any payments the secured creditor has received under the plan. The reason

is apparent. Chapter 13 proceedings fail because debtors lack funds to pay creditors the amounts promised under their Chapter 13 plans or lack the financial discipline to do so. The same lack of funds or financial discipline will commonly lead debtors to neglect or defer needed, but often costly, maintenance of the collateral.

Cars are particularly subject to rapid deterioration during the course of Chapter 13 proceedings because they require regular, costly maintenance to remain in operable condition and retain their value. Hard pressed debtors are also likely to skimp on insurance premiums, exposing their secured creditors to risk of total loss of the collateral or the expense of buying insurance for themselves.

Thus, when the Chapter 13 is dismissed and the creditor finally is permitted to foreclose, or when the creditor receives the collateral upon conversion to Chapter 7, it usually finds it has suffered a substantial loss during the delay caused by the failed Chapter 13 proceeding.[3]

As shown in the preceding section, Congress rationally chose to make Chapter 13 debtors compensate

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[3] The theoretical remedy of seeking relief from stay or adequate protection under 11 U.S.C. § 362(d)(1) is not available to secured creditors as a practical matter for several reasons. Secured creditors do not know which Chapter 13 debtors are among the third who will not complete their plans, and they are unlikely to have sufficient evidence to prove debtors are not properly maintaining the collateral. The cost of seeking relief from stay is a substantial deterrent to creditors holding comparatively small secured claims against consumer debtors. *See also* Petition, App. D, p. A-24 (noting the impracticality of of requiring "several thousand adequate protection motions").

secured creditors for these additional risks inherent in Chapter 13 proceedings. That compensation is the required sharing with secured creditors of the enhanced value of the collateral debtors retain under their Chapter 13 plans.

The opinion below improperly ignores these economic realities that underlie and justify Congress' decision in to require Chapter 13 debtors to pay secured creditors the value of the collateral in light of its proposed use by the debtor. This Court should grant certiorari to restore Congress' considered and correct policy choice.

4. The Opinion Below Gives Debtors An Unwarranted Windfall.

The opinion below is also wrong because it gives debtors an unjustifiable windfall. *See Dewsnup v. Timm*, ___ U.S. ___, 112 S.Ct. 773, 778 (1992).

By proceeding under Chapter 13, the debtor already receives the benefit of retaining his or her assets, while paying secured creditors less than the full amount of the debt owed. As already mentioned, Congress properly viewed retention of assets as a major benefit for debtors proceeding under Chapter 13. In addition, particularly in the case of real property collateral, the Chapter 13 debtor retains the benefit of any increase in the value of the property – a benefit which but for Chapter 13 would belong to the creditor whose debt was secured by that collateral. *Ibid.*

There is no reason to give Chapter 13 debtors the further benefit of paying only foreclosure value for collateral which they will retain. Such largess does not come free. It is paid for in higher prices, higher cost of credit or restricted availability of credit.[4] And the people who

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[4] To quote one study of consumer bankruptcy:

> In the competitive market that characterizes consumer credit, credit grantors must cover all of their costs in the rate charged for credit or in the price of goods sold on credit, or shift funds from consumer credit into some other field of economic activity. Thus, all costs of credit grantors must ultimately be paid by consumers. . . .
>
> The wealth transfer has been ably described in the Brookings Institute study of consumer bankruptcies:
>
> > The bankruptcy process operates . . . as a kind of redistributive mechanism whereby goods and services are supplied to one group at the expense of another. In personal bankruptcies, the first group consists of persons whose debts are discharged. The losses incurred by the merchants who sell to them are probably made up in part by sales to cash customers at higher prices than would prevail if debt losses were lower. Another part of those losses is borne by responsible users of credit who pay their debts and who bear their share in the form of higher credit charges or prices. . . .
> >
> > [Stanley & Girth, *Bankruptcy: Problem, Process & Reform* (Brookings Inst. 1971) at 37]
>
> Consequently, debates about public policies that affect the levels of bankruptcy losses should not be presented as a conflict between creditors and consumers. In the long run, in a competitive market bankruptcy costs are borne by consumers. The issue is which group of consumers is harmed and which

ultimately pay the price are other, often poorer, consumers.[5] 1 Credit Research Center, *supra* n. 4, at 96; White, *Economic Versus Sociological Approaches to Legal Research: The Case of Bankruptcy*, 25 Law & Soc. Rev. 685, 697 (1991).

There is no free lunch. There is no reason to force poorer consumers to pay the price of banquets for Chapter 13 debtors. Congress correctly chose to limit the benefits conferred on such debtors and require them to share with their secured creditors the enhanced value of collateral retained in the reorganization.

This Court should grant certiorari to establish a uniform interpretation of 11 U.S.C. §§ 506(a) and 1325(a)(5)(B) that avoids giving Chapter 13 debtors unwarranted windfalls and implements Congress' expressed intent and the statutory language it enacted.

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benefits or, in other words, which group of consumers pays the subsidy and which group receives it.

1 Credit Research Center, *Consumer Bankruptcy Study – Consumers' Right To Bankruptcy: Origins & Effects* (1982) at 93-94 (fns. omitted).

[5] The facts of this case are illustrative. The Mitchells were hardly destitute. Mr. Mitchell ran an apparently successful glass installation business. The Mitchells owned a total of three automobiles, including the Cadillac El Dorado at issue in this case. Petition, App. D, p. A-21. As the bankruptcy court noted in ruling on this case, it regularly sees claims involving relatively expensive cars, such as the Cadillac in this case or the Corvette in another case before it the same morning. *Ibid.*

CONCLUSION

For the reasons stated above, amici curiae pray that the Court grant the petition for certiorari, reverse the judgment of the Ninth Circuit, and hold that collateral retained by a Chapter 13 debtor should be valued at retail value under 11 U.S.C. § 506(a).

Respectfully submitted,

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No. 92-9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GENERAL MOTORS ACCEPTANCE CORPORATION,
Petitioner,

v.

GEORGE H. MITCHELL and CAROL J. MITCHELL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION AND SUPPLEMENTAL BRIEF IN OPPOSITION

TO MOTION FOR LEAVE TO FILE AND BRIEF
OF AMERICAN FINANCIAL SERVICES ASSOCIATION
AND CONSUMER BANKERS ASSOCIATION
AS AMICI CURIAE IN SUPPORT OF PETITIONER

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OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF OF AMERICAN FINANCIAL SERVICES ASSOCIATION AND CONSUMER BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

George H. Mitchell and Carol J. Mitchell, Respondents, respectfully oppose this Court's granting leave to the American Financial Services Association ("AFSA") and the Consumer Bankers Association ("CBA") to file their Amici Curiae Brief in support of General Motors Acceptance Corporation's ("GMAC") Petition for Writ of Certiorari.

As noted in AFSA and CBA's Motion, the Respondents refused to consent to the filing of an Amici Curiae Brief by AFSA and CBA. Pursuant to Rule 37.2, a motion for leave to file a brief *amicus curiae* when consent has been refused is not favored.

Respondents note that the Petitioner is one of the largest members of the American Financial Services Association. The interests of AFSA and CBA in the outcome of this case are identical to GMAC's. Neither AFSA nor CBA offer a different perspective on the effects of this Court's decision.

Respondents believe that the Petitioner, a very large corporation, is financially able to retain the best legal counsel in the country. Respondents believe GMAC has such competent counsel and is in no need of additional legal assistance.

To allow the filing of *amicus curiae* briefs such as the one submitted by AFSA and CBA only further burdens the Respondents' counsel. In contrast to GMAC's counsel, the Mitchells' counsel are a two-attorney, husband-and-wife law partnership. Appeals briefs are written at night after three children are put to bed.

Respondents' attorneys are fully capable of briefing

this case — however, they would appreciate responding to just one competent brief filed by GMAC (perhaps with suggestions or assistance by AFSA and CBA), rather than two or more uncoordinated briefs from entities with identical interests.

Respondents urge this Court to deny AFSA and CBA leave to file their *amici curiae* brief in support of GMAC's Petition for Writ of Certiorari in this case.

August 19, 1992

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ADDITIONAL RELEVANT STATUTORY PROVISIONS

United States Code, Title 11

Section 1325. *Confirmation of plan*

(a) Except as provided in subsection (b), the court shall confirm a plan if ——

...

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title [11 U.S.C. §§ 701 et seq.] on such date

ARGUMENTS IN OPPOSITION TO BRIEF OF PETITIONER'S AMICI CURIAE

1. **There is no inter-circuit conflict between the Ninth Circuit's decision in this case and the Fourth Circuit's decision in *In re Balbus*, 933 F.2d 246.**

This subject was addressed in Respondents' Brief in Opposition to GMAC's Petition for Writ, and will not be repeated here.

2. **The Bankruptcy Code does not state or imply that a debtor's assets are "enhanced" in value because of a Chapter 13 filing; nor are the debtor's assets enhanced in value, in actual fact. The Ninth Circuit's decision in this case gives no "windfall" to the debtors.**

AFSA and CBA romanticize the benefits received by Chapter 13 debtors in order to promote a public policy argument intended to convince this Court to diminish the benefits Congress did provide.

For example, AFSA and CBA assert that a debtor's assets magically increase in value upon filing a Chapter 13 case. (Amici Curiae Brief, p. 10-11). Nothing could be further from the truth. A car owned by a Chapter 13 debtor is not worth more either to the creditor or to the debtor the moment after a Chapter 13 petition is filed. Before the petition is filed, the car is in exactly the same mechanical and esthetic condition it is the next moment following the filing of the petition. AFSA and CBA claim that the debtor's ability to retain the car in a Chapter 13 in exchange for payment through the plan somehow enhances the value of the car. This just is not true.

The Ninth Circuit did not give any "windfall" to the Mitchells. The Mitchells did not receive the car free of charge. And, the car was not worth more because they filed a Chapter 13.

Chapter 13 debtors pay a stiff price for the protection they receive. They commit all their disposable income to funding the plan for a minimum of three years and often longer. Additionally, Chapter 13 debtors' sale and use of estate property is subject to bankruptcy court control during the pendency of the plan.

Also contrary to AFSA and CBA's claim, Chapter 13 debtors do *not* "avoid the stigma of bankruptcy and any resulting blot on their credit standing." *Ibid*. Creditors are fully

aware that "Chapter 13" is a specific chapter of the *Bankruptcy Code*, and this fact is duly noted on the credit records of Chapter 13 debtors.

AFSA and CBA portray Chapter 13 debtors as affluent and easily capable of paying more to creditors than required by the Bankruptcy Code. They mention that Mr. Mitchell ran "an apparently successful glass installation business." (Amici Curiae Brief, p. 18). In fact, Mr. Mitchell's business filed Chapter 11 and was subsequently liquidated under Chapter 7. Since filing the Chapter 13, the Mitchells have been divorced. The picture has not been quite as rosy as AFSA and CBA imagined.

3. Section 1325(a)(4) does not require a Chapter 13 debtor to pay *more* on unsecured claims than the holders of those claims would receive in a Chapter 7 liquidation.

In order to be confirmed by the Bankruptcy Court, a Chapter 13 plan must provide payment on unsecured claims in an amount "not less than ... would be paid on such claim if the estate of the debtor were liquidated under chapter 7."

The term "not less than" means "equal to or less than." "Equal to or less than" does not mean "more than." Therefore, § 1325(a)(4) establishes a minimum dividend on unsecured claims, but does not require Chapter 13 plans to exceed that minimum payment on unsecured claims.

In fact, most Chapter 13 plans do provide for payment on unsecured claim which *exceed* this minimum dividend. In many Chapter 13 cases, the debtors have no non-exempt (unprotected) unencumbered assets. Therefore, under the § 1325(a)(4) test, such a Chapter 13 plan may be confirmed with no dividend provided for unsecured claims.

General practice in Chapter 13 cases, however, almost invariably provides for some dividend on these claims. So,

although usually Chapter 13 plans do pay more on unsecured claims than would be received in Chapter 7 cases, it is not true that such treatment is mandated by the Bankruptcy Code.

The Mitchells' case is a good example of this typical situation. The Mitchells' Chapter 13 plan provided a 10% dividend to unsecured creditors, although in a Chapter 7 liquidation unsecured creditors would have received nothing.

AFSA and CBA assert that the supposed requirement to pay more on unsecured claims is an indication of Congressional intent to penalize debtors for availing themselves of the protections provided by Chapter 13. There is no authority whatsoever for this position. The statute and legislative history show that Chapter 13 is *favored* over Chapter 7, and Chapter 13 debtors are to be encouraged rather than discouraged from electing its protection.

4. Section 1325(a)(5) does provide for *better* treatment of secured claims than unsecured claims.

AFSA and CBA claim that § 1325(a)(5) provides that "holders of secured claims must receive even better treatment under Chapter 13 plans." (Amici Curiae Brief, p. 11). What AFSA and CBA mean by this assertion is not clear.

Certainly, secured claims are treated better than unsecured claims in Chapter 13 cases. The holder of a secured claim has an enforceable lien in property owned by the debtor. The Bankruptcy Code does not deprive the lienholder of that lien by virtue of the Chapter 13 filing. The Bankruptcy Code requires that the debtor compensate the creditor for that lien by paying the amount which the creditor would have received had it repossessed and disposed of the item on the petition date.

To treat the holder of a secured claim the same as the holder of an unsecured claim would unfairly deprive the

creditor of its property interest and the Bankruptcy Code does not do that.

AFSA and CBA, however, go beyond any provisions in the Bankruptcy Code when they argue that holders of secured claims are rewarded further by increased valuations if the debtor retains the security in the plan. The "value enhancement" referred to by AFSA and CBA (Amici Curiae Brief, p. 11) is completely imaginary and no reading of the Bankruptcy Code justifies this position.

5. **The Ninth Circuit's decision in this case does not render § 1325(a)(5) surplusage in light of § 1325(a)(4).**

AFSA and CBA state:

> Had Congress meant for secured creditors to be guaranteed only this minimal value in Chapter 13 plans, it would not have treated them separately under section 1325(a)(5), but would have simply combined both secured and unsecured claims under section 1325(a)(4), which guarantees payment of an amount not less than would be paid on the claim under a straight liquidation. (Amici Curiae Brief, p. 12, fn. 2)

AFSA and CBA err in this statement because they do not realize that a Chapter 7 trustee normally does not *pay* anything on secured claims.

In writing § 1325(a)(4) and (5), Congress recognized that in Chapter 7 cases, distributions from the estate are "paid" on unsecured claims by the trustee, but are *not* "paid" on secured claims, except in the unusual situation involving the trustee's voiding of a tax lien for the benefit of higher priority unsecured claims.

In a Chapter 7 case, the secured creditor retains its (otherwise unavoidable) lien on the property. If there is no un-exempted equity in the property, the debtor must elect to

surrender it, redeem it, or reaffirm the debt by negotiation with the creditor. In this case no *property of the estate* is distributed to the secured creditor, or *paid on such claim*.

If there *is* un-exempted equity in the property, then that equity becomes property of the bankruptcy estate. The trustee liquidates the estate's interest in the property. The trustee may come to a resolution with the secured creditor and propose a disposition of the bankruptcy estate's interest in the secured property, under 11 U.S.C. § 725. Alternatively, the trustee may obtain a court order authorizing the collateral to be sold, with the lien attaching to the proceeds of the sale. In any case, no *property of the estate* is distributed to the secured creditor, or *paid on such claim*. Note that property of the estate is distributed under a different section, 11 U.S.C. § 726.

These differences clearly show that the framers of the Bankruptcy Code visualized a coherent model of how secured and unsecured claims were to be treated in both Chapter 7 and Chapter 13 cases. Likewise, the Ninth Circuit decision in this case does *not* render § 1325(a)(5) surplusage in light of § 1325(a)(4).

6. **Sections 506(a) and 1325(a)(5)(B) were not intended to additionally compensate holders of secured claims for risks they incur under Chapter 13, and such an interpretation of the Bankruptcy Code would conflict with this Court's decision in *United Savings Ass'n v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).**

AFSA and CBA confuse the concept of adequate protection of a security interest under 11 U.S.C. § 361 with the valuation of the secured claim. In a reorganization plan, a creditor's security interest must be protected against depreciation and catastrophic loss, or the creditor may obtain relief from the restraining stay imposed by 11 U.S.C. § 362.

This adequate protection is separate from and does *not* increase the value of the secured claim. Similarly, compensation for deferred payments, commonly referred to as interest, is required under § 1325(a)(5)(B)(ii). This "interest" is separate from and does not increase the value of the secured claim.

The view of AFSA and CBA is contradicted by this Court's decision in *United Savings Ass'n v. Timbers of Inwood Forest Associates*, which found no authority in § 506(a) for *additionally* compensating the holder of a secured claim for being prevented from foreclosing on its security interest.

7. **The public policy concerns expressed by AFSA, CBA, and GMAC with regard to the Ninth Circuit's decision in this case are legislative rather than judicial in nature.**

It is true that the discharge of unsecured debt detrimentally affects other borrowers and the shareholders of lenders. This effect is diffused throughout the members of these classes. Congress recognized that this would occur, and in its deliberations reviewed economic studies of the projected effects of the discharge of debts. Congress adopted what it believed to be a fair result by balancing the interests of debtors against the interests of those who would be detrimentally affected.

The societal concerns of AFSA, CBA, and GMAC are public policy issues. If creditors believe there is any unfair treatment of the general public by the Bankruptcy Code, they may seek legislative redress. It is inappropriate for them to ask this Court to step into Congress's legislative role in that regard.

CONCLUSION

For these reasons, the Court should deny AFSA and CBA's motion for leave to file brief and deny GMAC's petition for a writ of certiorari.

Dated: August 19, 1992

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